Supreme Court, U.S.
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No. ——

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IN THE
Supreme Court of the United States

W.R. GRACE & CO.—CONN. and
CHRYSLER MOTORS CORPORATION,
Petitioners,

v.

WASHINGTON DEPARTMENT OF REVENUE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Washington

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Due Process Clause requirement of a "clear and certain remedy" under *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), violated by the State of Washington's assertion that taxpayers' exclusive remedy for relief under *Tyler Pipe Industries, Inc. v. State Department of Revenue*, 483 U.S. 232 (1987), is a retroactive tax credit that imposes onerous, discriminatory and retroactive record-keeping requirements on interstate businesses?

2. Is the Due Process Clause prohibition of a "bait and switch" remedy under *Reich v. Collins*, 513 U.S. 106 (1994), violated by the State of Washington's post-*Tyler Pipe* creation of an exclusive, retroactive tax credit to deny taxpayers existing injunction and refund remedies and allow the assessment of additional retroactive deficiencies?

3. Is the Due Process Clause violated by the State of Washington's attempt to collect retroactive tax deficiencies for 1980-87, inclusive, when this Court in *Tyler Pipe* declared the underlying tax unconstitutional?

4. Is the Commerce Clause violated by the State of Washington's imposition of an unconstitutional gross receipts tax scheme and discriminatory tax credit without apportioning the tax as this Court requires under *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995)?

LIST OF PARTIES

The following parties were Appellants and Plaintiffs below, and are Petitioners before this Court, listed here with their respective parents and nonwholly owned subsidiaries:

Chrysler Motors Corporation (n/k/a DaimlerChrysler Corporation)

Parents:

DaimlerChrysler North American Holding Corporation
DaimlerChrysler AG

Nonwholly owned subsidiaries:

DaimlerChrysler Mexico Holding, S.A. de C.V.
Chrysler Financial Company L.L.C.
Highland Park Development Corporation
Chase Securities Japan Limited
New Venture Gear, Inc.
Tritec Motors Ltda.
Cross Road Chrysler Plymouth, Inc., Okla. City, OK
East Tulsa Dodge, Inc., Tulsa, OK
Kingswood CP, Inc., Cincinnati, OH
Kirkland CPJE, Inc., Kirkland, WA
La Brea Avenue Motors, Inc., Los Angeles, CA
Lexington Park Motors, Lexington Park, MD
Midfield Dodge, Inc., Midfield, AL
Northwest Dodge, Inc., Houston, TX
Performance Dodge, Inc., Woodbury, NJ
Ross Park Dodge, Inc., Pittsburgh, PA
Stoneridge Motors, Pleasanton, CA
Upper Darby CP, Inc., Upper Darby, PA
Webster Chrysler Jeep, Inc., Webster, NY

W.R. Grace & Co.-Conn.

Parent: W.R. Grace & Co.

Nonwholly owned subsidiaries:

GN Holdings, Inc.
LB Realty, Inc.
W.R. Grace Argentina S.A.
Grace N.V.
Grace Brasil Ltda.
Grace Quimica Compania Limitada
Grace Colombia S.A.
W. R. G. Colombia S.A.
W. R. Grace SAS
Grace Hellas E.P.E.
W. R. Grace (Hong Kong) Limited
W. R. Grace Southeast Asia Holdings Limited
W. R. Grace & Co. (India) Private Limited
Trans-Meridian Insurance (Dubin) Ltd.
W. R. Grace Italiana S.P.A.
Grace Container, S.A. de C.V.
W. R. Grace Holdings, S.A. de C.V.
Amicon B.V.
W. R. Grace (Philippines), Inc.
W. R. Grace Taiwan, Inc.
W. R. Grace (Thailand) Limited
Chasmbridge Limited

The following party was the Appellee and Defendant below, and is the Respondent before this Court:

State of Washington, Department of Revenue

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Petitioners, W.R. Grace & Co.—Conn. ("Grace") and Chrysler Motors Corporation ("Chrysler"), respectfully request that the Court issue a writ of certiorari to review the judgment of the Supreme Court of Washington in *W.R. Grace & Co.—Conn. v. State Department of Revenue*, 973 P.2d 1011 (Wash. 1999).

OPINIONS BELOW

The opinion of the Supreme Court of Washington, reported at *W.R. Grace & Co.—Conn. v. State Department of Revenue*, 973 P.2d 1011 (Wash. 1999), is reprinted in the Appendix at 1a-59a.

The judgments of the state trial court are reprinted in the Appendix at 60a-91a (Final Judgment as to Grace at 82a; Final Judgment as to Chrysler at 72a; Order

Denying Motions for Reconsideration at 67a; and Letter Opinion and Order at 60a).

JURISDICTION

The Supreme Court of Washington issued its opinion on April 1, 1999. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Commerce Clause of the United States Constitution, which provide, respectively, as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

> The Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States . . . .

U.S. Const. art. I, § 8, cl. 3.

STATEMENT OF THE CASE

At their core the facts are relatively simple: we have an unapportioned business and occupation tax on gross receipts which, at least prior to the effective date of its amendment on August 11, 1987, violated the interstate commerce clause. Quite understandably the government wants to keep the moneys col-

> lected from this unconstitutional tax; in fact it wants to collect even more! Less understandably this court will not put a stop to it.

W.R. Grace & Co.—Conn. v. State Department of Revenue, 973 P.2d 1011, 1023 (Wash. 1999) (Sanders, J., dissenting) [26a].

The State of Washington imposes a business and occupation ("B&O") tax on "the act or privilege of engaging in business activities" in the State of Washington. Wash. Rev. Code § 82.04.220. The tax is imposed on manufacturing in the State (*id.* § 82.04.240), and on wholesale sales made in the State (*id.* § 82.04.270). The measure of the manufacturing tax is the value of the manufactured products, and the measure of the wholesale tax is the gross receips of the sales. The B&O tax contained a "multiple activities exemption" that exempted from the manufacturing taxes that portion of the output subject to the wholesale tax. *Id.* § 82.04.440(2).

Many taxpayers, including Grace and Chrysler (both of which manufacture products outside the State of Washington and sell them within the State), challenged the multiple activities exemption of the B&O tax. The Supreme Court of Washington upheld the constitutionality of the tax. *National Can Corp. v. Department of Revenue*, 732 P.2d 134 (Wash. 1986), *rev'd*, 483 U.S. 232 (1987).

This Court reversed in *Tyler Pipe Industries, Inc. v. State Department of Revenue*, 483 U.S. 232 (1987), holding that the State of Washington's "multiple activities exemption" violated the Commerce Clause because it discriminated against out-of-state manufacturers who sold their products within the state, as well as against in-state manufacturers who sold their products out of state. *Id.* at 253. This Court remanded *Tyler Pipe* to the Supreme

Court of Washintgon for resolution of the remedial issues applicable to the taxpayers in that case. *Id.*

On remand from this Court, the Supreme Court of Washington held that *Tyler Pipe* applied prospectively only, and denied the taxpayers' refund claims for all periods prior to the date of this Court's decision. *National Can Corp. v. State Dept. of Revenue*, 749 P.2d 1286 (Wash.), *cert. denied*, 486 U.S. 1040 (1988).[1] This Court denied the taxpayers' petition for review of the decision denying their refund claims. *Tyler Pipe*, 483 U.S. at 240.

In the meantime, the Washington Legislature purported to remedy the unconstitutional discrimination that this Court found in *Tyler Pipe*, by enacting a two-way credit under the B&O tax, entitled the "Multiple Activities Tax Credit" ("MATC"). 1987 Wash. Laws, 2d Ex. Sess., ch. 3 § 2; Wash. Rev. Code § 82.04.440 (effective August 12, 1987). Under the MATC, all taxpayers engaged in manufacturing in Washington must pay a manufacturing tax, and all taxpayers engaged in selling in Washington must pay a selling tax. *Grace*, 973 P.2d at 1013. Taxpayers paying the selling tax may take a credit for the manufacturing tax or for an identical tax paid to another jurisdiction on the same product. Taxpayers paying the manufacturing tax and selling out of state can take a credit for an identical selling tax paid to another jurisdiction on the same product. *Id.*

In order to qualify for the MATC, interstate taxpayers must prove both the amount of gross receipts taxes ac-

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1 The Washington Supreme Court subsequently reversed this holding, and held that *Tyler Pipe* applies retroactively to taxable activities occurring prior to the date of *Tyler Pipe*. *Digital Equip. Corp. v. State Dept. of Revenue*, 916 P.2d 933 (Wash. 1996), *cert. denied*, 520 U.S. 1273 (1997). *See Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995).

tually paid to other jurisdictions on the same product and the technical similaries between those taxes and the Washington B&O tax. In-state manufacturers and sellers, on the other hand, are entitled to an *automatic* credit under the MATC. In order to prove its entitlement to the MATC, an interstate taxpayer must produce voluminous and detailed product-specific documentation, down to proving the existence of the same ingredients or products upon which the Washington B&O tax was paid. Wash. Admin. Code § 458-20-19301(4)(d) ("The business activity subject to tax, and against which credit(s) is claimed, must involve the same ingredients or product upon which the tax giving rise to the credit(s) was paid. The credits must be product-specific.").

Moreover, interstate taxpayers claiming the MATC are required to keep and preserve all records and documents "as may be necessary to prove their entitlement to any credits taken." Wash. Admin. Code § 458-20-19301(9). These records must be kept for a period of "no less than five years from the date of the tax return upon which the related tax credits are claimed." *Id.* These records include the following:

> (a) Copies of sales contracts or other written or memorialized evidence of any sales agreements, including purchase and billing invoices showing the origin state and destination state of products sold. (b) Copies of shipping or other delivery documents identifying the products sold and delivered, reconcilable with the selling documents of subsection (a) above, if appropriate. (c) Copies of production reports, transfer orders, and similar such documents which will reflect the intercompany or interdepartmental movement of extracted ingredients or manufactured products where no sale has occurred. (d) Copies of tax returns or reports filed with other states' taxing authorities showing the kinds and

> amounts of taxes paid to such other states for which MATC is claimed. (e) Copies of cancelled checks or other proofs of actual tax payment to the other state(s) giving rise to the MATC claimed. (f) Copies of any other state(s) taxing statutes, laws, ordinances, and other appropriate legal authorities necessary to establish the nature of the other states' tax as a gross receipts tax, as defined in this section . . . .

Wash. Admin. Code § 458-20-19301(9).[2] *See* Wash. Rev. Code § 82.32.050. The State regulations further provide sanctions for a taxpayer's inability to prove entitlement to the MATC:

> Failure to keep and preserve proofs of entitlement to the MATC will result in the denial of credits claimed and the assessment of all taxes offset or reduced by such credits as well as the additional assessment of interest and penalties as required by law.

Wash. Admin. Code § 458-20-19301(9)(g).

Subsequent to *Tyler Pipe*, the Washington Department of Revenue issued three B&O tax assessments against Grace for the periods January 1980 through December 1990.[3] *Grace*, 973 P.2d at 1014. Grace challenged the constitutionality of the assessments in state trial court, seeking damages, and declaratory and injunctive relief. *Id.* The Department of Revenue also assessed B&O taxes against Chrysler for tax periods from January 1984 through June 1988; and Chrysler also challenged the con-

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2 These recordkeeping requirements are more onerous than the requirements generally imposed on all Washington taxpayers to maintain "suitable" records. Wash. Rev. Code § 82.32.070(1)(a).

3 These B&O tax assessments were issued in November, 1985, and December, 1992. [64a]

stitutionality of the assessments in state trial court.[4] *Id.* The Department of Revenue asserted state law defenses against these taxpayers' claims, and counterclaimed for unpaid taxes, penalties, and interest. *Id.*

On motions for partial summary judgment filed by all parties, the trial court upheld the constitutionality of the MATC, applied the MATC retroactively, and remanded the cases to the Department of Revenue for recomputation of the taxpayers' assessments under the MATC. *Id.* at 1014.[5] On motions for reconsideration, the trial court ruled that no penalties would be included in the judgment against the taxpayers, upheld the assessment of interest, and confirmed its earlier ruling that *Tyler Pipe* applied retroactively. *Id.*

On appeal, the Supreme Court of Washington upheld the constitutionality of the MATC as the exclusive remedy for the unconstitutional discrimination under the B&O tax, remanding for further action consistent with the opinion. Thus, by judicial decision, the Washington courts have retroactively imposed the MATC on taxpayers for periods predating both the effective date of the MATC (August 12, 1987) and the date of *Tyler Pipe* (June 23, 1987). *E.g., Digital Equip. Co. v. State Department of Revenue*, 916 P.2d 933 (Wash. 1996) (imposing the MATC as the taxpayer's exclusive remedy for unconstitu-

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[4] The Department issued two B&O tax assessments against Chrysler on February 25, 1994, for the period January 1984 through June 1988. *Grace*, 973 P.2d at 1014; [64a].

[5] The trial court entered judgment against Grace in the amount of $1,311,535.00, composed of B&O tax of $654,267.00, plus interest of $657,268.00 through the date of the judgment. The trial court entered judgment against Chrysler in the amount of $1,490,456.00, composed of B&O tax of $935,612.00 less MATC of $125,929.00, plus interest of $680,773.00 through the date of the judgment. [70a]

tional taxes paid during tax periods beginning January 1, 1983).

Petitioners seek this Court's Writ of Certiorari to review the decision of the Supreme Court of Washington, invalidate the retroactive assessments, and enjoin the imposition of the discriminatory B&O tax.

REASONS FOR GRANTING THE WRIT

I. THE MATC DOES NOT PROVIDE TAXPAYERS WITH A "CLEAR AND CERTAIN REMEDY" FOR THE UNCONSTITUTIONAL B&O TAX BECAUSE IT IMPOSES ONEROUS, DISCRIMINATORY RETROACTIVE RECORD-KEEPING REQUIREMENTS AND PROVIDES NO MEANINGFUL BACKWARD-LOOKING RELIEF.

The essence of due process is the opportunity to be heard at "a meaningful time and in a meaningful manner." *McKesson Corp. v. Division of Alcoholic Bev. & Tobacco*, 496 U.S. 18, 39 n.22 (1990). In state tax cases, due process dictates that a state "must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy,' from any erroneous or unlawful tax." *Id.* at 39 (citations and footnote omitted). While states retain the flexibility to maintain an exclusively pre-deprivation remedial scheme or an exclusively post-deprivation scheme, or a hybrid, at bottom the process must be "clear and certain" to a reasonable taxpayer. *E.g., Reich v. Collins*, 513 U.S. 106, 108 (1994).

The requirement that states provide taxpayers a "clear and certain remedy" plays a key role in realizing the protection of the Due Process Clause. This Court has vigorously enforced this principle "to ensure that the opportunity to contest the tax is a meaningful one." *McKesson*, 496 U.S. at 39; *see also Reich*, 513 U.S. at 108; *Harper*

v. Virginia Dep't of Taxation, 509 U.S. 86 (1993). Defining the proper standard for analyzing the adequacy of state remedial options is, therefore, of critical importance to effectuating this Court's Due Process Clause requirements.

In *McKesson*, this Court reviewed a decision of the Florida Supreme Court that held unconstitutional a liquor tax statute that provided rate reductions for certain products commonly grown in Florida and used in alcoholic beverages produced in Florida. The statute had been successfully challenged by McKesson Corporation, a wholesale distributor of alcoholic beverages whose products did not qualify for the rate reductions. McKesson petitioned this Court for review because the Florida Supreme Court had only enjoined future enforcement of the preferential rate reductions, and refused to order a refund or other relief for the discriminatory taxes McKesson had previously paid.

This Court held that in a post-deprivation refund action, in order to satisfy the Due Process Clause, the State of Florida had to provide McKesson a "clear and certain remedy" for any unlawful tax collection to ensure that the opportunity to contest the tax was a meaningful one. In reversing and remanding the case, this Court stated:

> More specifically, the State may cure the invalidity of the Liquor Tax by refunding to petitioner the difference between the tax it paid and the tax it would have been assessed were it extended the same rate reductions that its competitors actually received. *Cf. Montana National Bank* and [*Iowa-Des Moines Nat. Bank v.*] *Bennett*[, 284 U.S. 247 (1931)] (curing discrimination through such refunds). Alternatively, to the extent consistent with other constitutional restrictions, the State may assess and collect back taxes from petitioner's competitors who

> benefited from the rate reductions during the contested tax period, calibrating the retroactive assessment to create in hindsight a nondiscriminatory scheme. *Cf. Bennett*, 284 U.S. at 247, 76 L. Ed. 265, 52 S. Ct. at 136 (suggesting State could erase the unconstitutional discrimination by "collecting the additional taxes from the favored competitors"). Finally, a combination of a partial refund to petitioner and a partial retroactive assessment of tax increases on favored competitors, so long as the resultant tax actually assessed during the contested tax period reflects a scheme that does not discriimnate against interstate commerce, would render petitioner's resultant deprivation lawful and therefore satisfy the Due Process Clause's requirement of a fully adequate post-deprivation procedure.

496 U.S. at 40-41 (footnote omitted). The Court acknowledged that a state's effort at a retroactive assessment against benefitted taxpayers "may not be perfectly successful," but suggested that, at a minimum, "a good-faith effort to administer and enforce such a retroactive assessment likely would constitute adequate relief." 496 U.S. at 40 n.23.

Grace and Chrysler are in the same position as McKesson, insofar as having paid taxes pursuant to a taxing statute that this Court declared discriminatory and unconstitutionally preferential. Petitioners are in worse shape than McKesson to the extent that the State of Washington now seeks to collect from them additional taxes, both retroactively and in the future, under an unconstitutional taxing scheme. When this Court remanded *Tyler Pipe*, the State of Washington did not provide Grace or Chrysler the clear and certain remedy that McKesson obtained. Rather, the State conceived a legislative scheme wherein the only way that Chrsyler and Grace

could avoid the unconstitutional tax was by seeking illusory benefits under the MATC.

A "clear and certain remedy" for taxes imposed in violation of the Commerce Clause requires that the injured taxpayers be protected from "comparative economic disadvantage." *McKesson*, 496 U.S. at 43. A State must ultimately collect a tax for the contested period that "in no respect impermissibly discriminates against interstate commerce." *Id.* at 43 n.27; *see also Armco, Inc. v. Hardesty*, 476 U.S. 638, 642 (1984) ("a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.") In sum:

> [T]he State's duty under the Due Process Clause to provide a "clear and certain remedy" requires it to ensure that the tax as *actually imposed* on [the injured taxpayer] and its competitors during the contested tax period does not deprive [the injured taxpayer] of tax moneys in a manner that discriminates against interstate commerce.

McKesson, 496 U.S. at 43 (emphasis original; footnote omitted).

The B&O tax discriminated against interstate commerce when this Court analyzed it in 1987. It discriminates against interstate commerce today. The State of Washington's attempt at a remedy is a thinly-disguised and disingenuous flaunting of this Court's ruling. The MATC does not equalize the tax burden imposed upon interstate and intrastate taxpayers, and engenders a comparative economic disadvantage for interstate businesses that is proscribed by the Commerce Clause. An intrastate business is entitled to an automatic, 100% credit for its B&O manufacturing taxes against its B&O selling taxes. Wash. Rev. Code § 82.04.440. This automatic, 100% credit is

taken by the intrastate business directly on its B&O tax return. In contrast, interstate businesses are forced through a difficult and burdensome procedure to prove their entitlement to any credit at all. This procedure includes identifying manufacturing or selling activities in another jurisdiction that has a gross receipts tax identical to the B&O tax; tracing individual ingredients or products from the manufacturing state to the State of Washington; and maintaining (for a period of no less than five years from the date of the tax return upon which the credits are claimed) copies of all sales contracts, purchase and billing invoices, shipping or other delivery documents, production reports and transfer orders, tax returns or reports filed with other jurisdictions, cancelled checks or other proof of tax payment to other jurisdiction, and the other jurisdictions' taxing statutes, laws, and ordinances. Wash. Admin. Code § 458-20-19301(9). Failure to keep and preserve all of these records automatically results in denial of the MATC and an assessment of all discriminatory taxes allegedly offset or reduced by such credits, as well as the additional assessment of interest and penalties. *Id.* at (9)(g).

These onerous requirements render the MATC constitutionally infirm, because as a practical matter it is unavailable to interstate businesses. The retroactive imposition of these recordkeeping requirements upon Grace and Chrysler, which had no independent reason to maintain these records, compounds the constitutional violation. As explained by Justice Sanders in his dissenting opinion:

> Thus, as a practical matter, the in-state taxpayer enjoys an automatic 100 percent credit whereas the interstate taxpayer is lucky to recoup 1 percent, if that.
>
> The discriminatory burden placed upon interstate taxpayers to obtain the benefits of a tax credit in

> excess of that burden placed upon in-state taxpayers is so readily apparent that the lesson is clear to anyone engaged in interstate business that the business is much better off to move in-state so as to claim a B&O credit to both manufacture and sell in-state rather than risk a doubtful and difficult-to-prove credit for performing one of those functions out-of-state. This record demonstrates the cumbersome, if not impossible, procedure to recoup taxes paid in other jurisdictions to offset duplicitous taxes paid by the interstate business under the discriminatory Washington B & O tax falls much more heavily on the shoulders of interstate businesses than on their in-state counterparts.

Grace, 973 P.2d at 1032 (Sanders, J., dissenting) (footnote omitted).

Out of more than 100 taxpayers involved in the consolidated action below, only one (Petitioner Chrysler) succeeded in qualifying for the MATC, and received only a minimal credit even before taking into account the litigation expense required to obtain it. Out of over $4.1 million in unconstitutional B&O taxes retroactively assessed and paid, Chrysler was awarded a credit of only $125,929, or approximately three percent (3%). [70a] Chrysler was awarded this credit only after enduring extensive discovery proceedings by the Department, including depositions. A local manufacturer, in contrast, would have received an automatic credit for the entire $4.1 million.

The record below also shows that the total interstate MATC from 1988 to 1989 was $1 million, which was only six-tenths of one percent (0.6%) of the total wholesale B&O tax of $150 million paid by out-of-state manufacturers in 1987-89. *See id.* at 1032 n.22 (Sanders, J., dissenting). For the period from 1988 through 1993, the total interstate credits were $5.7 million, compared to

intrastate credits totalling $670.30 million. *Id.* The disparate treatment of interstate and intrastate taxpayers is readily apparent.

The MATC also fails to provide taxpayers with a "clear and certain" remedy because it requires taxpayers to prove that specific manufacturing or selling activities have been subjected to double taxation. Interstate taxpayers must prove that the tax imposed by another jurisdiction was identical to Washington's B&O tax and that the tax was imposed upon specific products or ingredients traced through the manufacturing, distribution, and selling process. This Court has categorically rejected any requirement that a taxpayer prove that specific interstate transactions were subjected to multiple taxation in order to advance a claim of discrimination. *Tyler Pipe*, 483 U.S. at 242, 247-48. Yet, this impermissible burden on interstate commerce is precisely what is required under the discriminatory MATC.

In order to justify the retroactive imposition of the MATC as the exclusive remedy for the unconstitutional B&O tax, the Supreme Court of Washington purports to rely upon this Court's dicta in *Tyler Pipe* that reads:

> Either a repeal of the manufacturing tax or an expansion of the multiple activities exemption to provide out-of-state manufacturers with a credit for manufacturing taxes paid to other States would presumably cure the discrimination.

483 U.S. at 249.

The court below misconstrues this Court's suggestion as endorsing the discriminatory MATC as the exclusive remedy for the defective B&O tax. This Court in *Tyler Pipe* did not "specifically approve" the MATC or any similar credit. Rather, this Court remanded *Tyler Pipe* to the Supreme Court of Washington for resolution of

the "remedial issues," not knowing what they might be, and not approving any particular remedy in advance and sight unseen. The Court could not have foreseen the draconian hoops an aggrieved taxpayer would be required to jump through in order to obtain a credit against the discriminatory tax. *Tyler Pipe*, 483 U.S. at 253. The Court could not have foreseen unconstitutional, retroactive deficiencies being assessed against Grace and Chrysler. At the very most, this statement represents a suggested solution for correcting continued discrimination and has no relevance to the clear and certain remedy that must be offered for those suffering retroactive discrimination under the invalid statute.

The court in *General Motors Corp. v. City & County of San Francisco*, 81 Cal. Rptr. 2d 544 (Cal. App. 1999), agreed with this analysis of *Tyler Pipe* when it stated:

> Moreover, the court in *Tyler Pipe Industries* was suggesting a possible prospective statutory cure, not endorsing a credit system as an adequate retroactive remedy. As discussed earlier, the City's proposed credit does not provide " 'clear and certain' " relief given the onerous burden it places on taxpayers to document double taxation reaching back 17 years. (*McKesson Corp. v. Florida Alcohol & Tobacco Div., supra*, 496 U.S. at p. 32, 110 S. Ct. 2238).

81 Cal. Rptr. 2d at 549.

In the instant case, Washington's MATC suffers from a similar defect. This "exclusive remedy" would be imposed retroactively from its adoption seven and a half years against Grace and three and a half years against Chrysler. This Court could not have, in a vacuum, contemplated the retroactive assessment of unconstitutional deficiencies on the theory that the MATC is the exclusive remedy for the B&O tax's constitutional infirmities.

That, nevertheless, is precisely the justification the Washington Court advances for upholding the MATC.

This Court should correct the Supreme Court of Washington's flawed reading of *Tyler Pipe* and hold that the retroactive imposition of the MATC is not a clear and certain remedy, and thereby violates the Due Process Clause.

II. WASHINGTON'S REFUSAL TO GRANT INJUNCTIVE RELIEF OR REFUNDS UNDER EXISTING STATUTES, ITS RETROACTIVE IMPOSITION OF THE MATC AS THE EXCLUSIVE REMEDY, AND ITS ASSESSMENT OF ADDITIONAL DEFICIENCIES, ARE UNCONSTITUTIONAL "BAIT AND SWITCH" TACTICS UNDER THE DUE PROCESS CLAUSE.

In *Reich v. Collins*, 513 U.S. 106 (1994), this Court recognized that, while a state retains flexibility under the Due Process Clause to formulate its remedial scheme for taxes collected in violation of federal law, a state may not hold out what plainly appears to be a "clear and certain" refund remedy and then declare, only after the taxes have been paid, that no such remedy exists. *Id.* at 110-11. In *McKesson*, this Court held that a state must provide both a "fair opportunity to challenge the accuracy and legal validity of [a] tax obligation" and a " 'clear and certain remedy' for any erroneous or unlawful tax collection." 496 U.S. at 39 (citation omitted).

In *Reich*, the taxpayer sought a refund of state income tax imposed in violation of this Court's intergovernmental tax immunity doctrine. 513 U.S. at 108-09. The taxpayer relied on a Georgia refund statute that the state courts had consistently held to provide for refunds from unconstitutional taxes. *Id.* at 112. However, the Georgia Supreme Court denied the taxpayer relief, stating that

Georgia law afforded taxpayers "ample" pre-deprivation procedures under which the tax could have been challenged before payment, *id.* at 110, and that the refund statute did not apply to situations where the law under which the taxes were assessed is itself declared unconstitutional. *Id.* at 109.

This Court reversed, and held that the Due Process Clause does not allow a state to "bait and switch" taxpayers by holding out what plainly appears to be a "clear and certain" refund procedure and then denying a refund on the grounds that the taxpayer should have followed a theretofore unannounced prepayment remedy:

> [D]ue process requires a "clear and certain remedy for taxes collected in violation of federal law" [citation omitted]. A State has the flexibility to provide that remedy before the disputed taxes are paid (predeprivation), after they are paid (postdeprivation), or both. But *what [a State] may not do, and what Georgia did here, is hold out what plainly appears to be a "clear and certain" postdeprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists.*

513 U.S. at 108 (emphasis supplied; citation omitted). The Court admonished that, even assuming the constitutional adequacy of the alleged pre-deprivation procedures, Georgia's reliance on those procedures was "entirely beside the point" because "no reasonable taxpayer would have thought that they represented, in light of the apparent applicability of the refund statute, the *exclusive* remedy for unlawful taxes." *Id.* at 111 (emphasis in original).

This Court again condemned a state's bait and switch tactic in *Newsweek, Inc. v. Florida Department of Revenue*, 522 U.S. 442, 118 S. Ct. 904 (1998). In *Newsweek*, the taxpayer paid a tax that violated the First Amend-

ment and subsequently filed a refund claim pursuant to Florida Statutes. The Florida courts denied Newsweek's refund claim, on the grounds that Newsweek should have pursued an alleged pre-deprivation procedure. Relying on *Reich*, this Court held that "Newsweek is entitled to a clear and certain remedy and thus it can use the refund procedures to adjudicate the merits of its claim." 118 S.Ct. at 905. The Court held that "[w]hile Florida may be free to require taxpayers to litigate first and pay later, due process prevents it from applying this requirement to taxpayers, like Newsweek, who reasonably relied on the apparent availability of a postpayment refund when paying the tax." *Id.*

In this case, the "bait" set out by the State of Washington was its clear and unequivocal statute which authorized injunctive relief as a remedy for assessments in violation of the Constitution of the United States, Wash. Rev. Code § 82.32.150. Additionally, Washington statutes provided that, "in computing tax there may be deducted from the measure of tax amounts derived from business which the state is prohibited from taxing under . . . the constitution or laws of the United States." Wash. Rev. Code § 82.04.4286.

Because of the existence of these remedies, the retroactive imposition of the MATC as exclusive remedy for the unconstitutional B&O tax is an impermissible "bait and switch" tactic by the State of Washington, which this Court should not countenance. As this Court has stated,

> Whether acting through its judiciary or through its Legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 682 (1930) (footnote omitted). The State of Washington has done precisely that. Before enactment of the MATC, taxpayers had no reason to believe that these credit procedures (which did not even exist during the tax periods in question) were the exclusive remedy or that the MATC barred the plain statutory pre-deprivation and post-deprivation remedies afforded by state law.

The Supreme Court of Washington, itself, held that if B&O taxes were collected in violation of the United States Constitution, then the state statutes would mandate refunds. *National Can Corp. v. State Department of Revenue*, 749 P.2d 1286 (Wash. 1989). The only reason that refunds were not mandated in *National Can* was that the Supreme Court of Washington, mistakenly, held that *Tyler Pipe* did not apply retroactively. 749 P.2d at 1295. The Supreme Court of Washington subsequently reversed its position and held that *Tyler Pipe* does apply retroactively, yet it "switched" the remedy to retroactive imposition of the MATC. *Digital Equip. Co. v. Department of Revenue*, 916 P.2d 933 (Wash. 1996). Notably, the MATC was enacted prior to the decision in *National Can*, yet the Supreme Court of Washington stated at that time that the state refund statutes would mandate refunds. Now that it is clear that *Tyler Pipe* applies retroactively, the Supreme Court of Washington has impermissibly changed its view of the mandated remedy. The resulting constitutional violation requires that this Court reverse and remand for entry of judgment in favor of Petitioners.

III. WASHINGTON'S RETROACTIVE ASSESSMENT OF AN UNCONSTITUTIONAL TAX FOR TAX PERIODS UP TO SEVEN YEARS PRIOR TO THE DECLARATION OF UNCONSTITUTIONALITY VIOLATES THE DUE PROCESS CLAUSE.

When this Court in *McKesson* stated that the discrimination caused by an invalid tax might be cured by retroactively taxing those who had received the unlawful preferences, it was careful to point out in footnote 23 of its opinion:

> We previously have held that the retroactive assessment of a tax increase does not necessarily deny due process to those whose taxes are increased, though beyond some temporal point the retroactive imposition of a significant tax burden may be "so harsh and oppressive as to transgress the constitutional limitation," depending on "the nature of the tax and circumstances in which it is laid."

McKesson, 496 U.S. at 40 n.23 (quoting *Welch v. Henry*, 305 U.S. 134, 147 (1938)).

More recently, in *United States v. Carlton*, 512 U.S. 26 (1994), this Court emphasized that the test to determine the validity of a retroactive tax under the Due Process Clause is the same as that generally applicable to retroactive economic legislation. 512 U.S. at 30-31. That test requires that the retroactive tax provision be supported by a legitimate legislative purpose and that that purpose be furthered by rational means. *Id.* This Court emphasized that:

> "To be sure, . . . retroactive legislation does have to meet a burden not faced by legislation that has only future effects. . . . 'The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.' . . . But that

> burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose.

512 U.S. at 31 (quoting *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729-30 (1984) (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976)).

Significantly, the Court upheld the retroactive narrowing of a tax deduction in that case for two reasons: (1) Congress had a legitimate legislative purpose in correcting what it reasonably believed was a mistake in the wording of the original deduction when it was passed, and (2) the corrective legislation imposed only a "modest period of retroactivity" of slightly over a year. Justice O'Connor, concurring, noted that, "A period of retroactivity of longer than a year preceding the legislative session in which the law was enacted would raise, in my view, serious constitutional questions." 512 U.S. at 38 (O'Connor, J., concurring).

Unlike the congressional legislation in *Carlton*, Washington's enactment of the MATC in an effort to retroactively collect a tax that this Court has already held to be discriminatory can hardly be said to be a legitimate legislative purpose. Furthermore, the MATC, as interpreted by the Supreme Court of Washington, places *no* limits on the extent of retroactivity which, in the instant case, runs up to seven years.

The MATC decidedly interferes with the settled expectations of taxpayers. When Petitioners paid the taxes in question, Washington law provided a clear statutory right to both pre-deprivation and post-deprivation remedies against unconstitutional taxes. Under this Court's precedent, including *Reich* and *Newsweek*, Petitioners had a constitutional right to rely on these pre-existing

remedies. The retroactive imposition of the discriminatory MATC as the exclusive remedy for the unconstitutional B&O tax unduly interferes with these settled expectations, because the remedy for the unconstitutional B&O tax could have been achieved by other, less intrusive means; *i.e.*, a refund to these taxpayers or a retroactive assessment against the benefited taxpayers, or a combination of the two. Instead, the State has imposed retroactive assessments against Grace and Chrysler, two of the victims of its discrimination, for tax years including 1980 to 1990.

The existence of these less intrusive alternatives is further proof that the MATC is not supported by a legitimate legislative purpose. The Washington Legislature has limted the MATC to periods ending on or after June 23, 1987 (the date of *Tyler Pipe*).[6] The Supreme Court of Washington, however, has ignored this limitation and imposed the MATC retroactively for periods back to 1980. The onerous requirements imposed upon interstate businesses to qualify for the MATC expose an intent to deny any relief to interstate businesses, while granting an automatic credit to intrastate businesses. That discrimination imposes a more heavy burden on interstate commerce than on intrastate commerce, in violation of the Commerce Clause and this Court's precedent. *E.g.*, *Armco, Inc. v. Hardesty*, 467 U.S. 638, 642 (1984).

Likewise, the Washington court's retroactive imposition of the discriminatory MATC as the exclusive remedy for the unconstitutional B&O tax is applied so far back in time as to violate the Due Process Clause. The Supreme

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[6] In 1994 the Washington Legislature amended the MATC to expressly limit the remedy to "all tax reporting periods [ending] on or after June 23, 1987." Laws of 1994, ch. 124, § 7. *See Grace*, 973 P.2d at 1023, 1027 & n.11 (Sanders, J., dissenting).

Court of Washington held—in 1999—that a 1987 statute imposed the exclusive remedy for tax periods dating back to 1980 for Grace and 1984 for Chrysler. This retroactive imposition of unconstitutional deficiencies, particularly in light of the virtually insurmountable recordkeeping burdens imposed 19 years after the fact and only upon interstate businesses, is an onerous and unfair burden that cannot be justified under the Due Process Clause. *E.g., General Motors Corp. v. City & County of San Francisco*, 81 Cal. Rptr. 2d 544 (Cal. App. 1999) (striking down retroactive imposition of credit remedy requiring taxpayers to document double taxation reaching back 17 years).

The record shows that the recordkeeping requirements of the MATC are particularly onerous when retroactively imposed upon taxpayers years after the tax period in question. Grace's manager of state and local taxes testified that the company had not kept the extensive and detailed records subsequently mandated by the MATC because Grace was not required to do so prior to the effective date of the MATC and the regulations applicable to it. *Grace*, 973 P.2d at 1032 n.21 (Sanders, J., dissenting). Chrysler's Chief Tax Counsel also testified that the company failed to keep these records because it was under no legal obligation to do so. *Id.* (Sanders, J., dissenting). An interstate taxpayer that fails to originally make or thereafter maintain these records is absolutely prohibited from taking the MATC, while an in-state taxpayer is entitled to an automatic credit. *Id.* at 1032 (Sanders, J., dissenting).

The Court should grant the Petition and remand the case with instructions to the Supreme Court of Washington to cancel the retroactive deficiencies and correct these constitutional violations.

IV. WASHINGTON'S FAILURE TO APPORTION THE B&O TAX TO REFLECT THE LOCATION OF TAXABLE ACTIVITIES VIOLATES THE COMMERCE CLAUSE.

The Commerce Clause allows a state to impose a gross receipts tax upon interstate activity only if the tax is apportioned to reflect the part of the total activity occurring within the state. *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948). The possibility of a credit against the gross receipts tax does not cure an unconstitutional failure to apportion the tax. *Id.* at 663. Yet, in *Tyler Pipe*, this Court rejected an argument that the B&O tax did not fairly apportion the tax burden between activities in Washington and activities in other states, reasoning that the tax was legitimately imposed upon a separate activity conducted wholly within Washington—similar to a sales tax.

The rationale of analogizing a gross receipts tax to a sales tax for apportionment purposes was abandoned in this Court's subsequent decision in *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995). In *Jefferson Lines*, the Court held that Oklahoma could impose a retail sales tax on the purchaser of a ticket for interstate bus travel measured by the total price of the ticket, without apportionment. The Court reasoned that the sale of the ticket was a separate, taxable activity occurring in only one state. In so holding, the Court distinguished *Central Greyhound* based upon the Court's present understanding of the nature of a gross receipts tax. The Court expressed the view that the gross receipts tax in *Central Greyhound* was "simply a variety of tax on income, which was required to be apportioned to reflect the location of the various activities by which it was earned." *Jefferson Lines*, 514 U.S. at 190.

The Court's view in *Jefferson Lines* that a gross receipts tax is "simply a variety of tax on income" that must be apportioned, draws a distinction between gross receipts taxes and sales taxes that stands as a marked departure from the Court's analysis in *Tyler Pipe* and other B&O tax cases.[7] The Court's new view undercuts the validity of the apportionment analysis in *Tyler Pipe*. As explained by Professors Hellerstein, McIntyre and Pomp, *Commerce Clause Restraints on State Taxation After Jefferson Lines*, 51 Tax L. Rev. 47, 97-98 (1995) (hereafter, "Hellerstein"):

> By drawing a sharp line between gross receipts taxes and retail sales taxes, and characterizing the gross receipts tax in *Central Greyhound* as akin to an income tax, the Court has called into question some of its earlier decisions that approved unapportioned gross receipts taxes merely because they were imposed on a "local" subject and could be analogized loosely to retail sales taxes. After *Jefferson Lines*, gross receipts taxes on interstate transactions should not be exempted from the apportionment requirement on the basis of a false analogy to retail sales taxes.
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> [C]ases like *General Motors*, *Standard Pressed Steel* and *Tyler Pipe*, are problematic, because they approved unapportioned gross receipts taxes measured by values reflecting interstate activity. . . . After *Jefferson Lines*, the constitutionality of these cases is suspect.

Specifically addressing the constitutionality of Washington's B&O tax under the Court's new view of gross

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[7] *General Motors Corp. v. Washington*, 377 U.S. 436 (1964) and *Standard Pressed Steel Co. v. Department of Revenue*, 419 U.S. 560 (1975).

receipts taxes expressed in *Jefferson Lines*, these scholars have concluded that:

> Washington, however, taxed the gross receipts attributable not only to wholesaling, which took place in the state, but also to manufacturing, which took place outside the state. The value of the goods at the time they entered the state became part of the Washington tax base, which would be acceptable under a retail sales tax but is unacceptable under a business activities tax of the type imposed by Washington. A state should not be allowed to parlay a local hook called wholesaling into taxing activities that took place elsewhere.
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> * * * *
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> By not adequately dealing with the apportionment issue in *Tyler Pipe*, the Court's holding effectively allows Washington to tax an out-of-state manufacturer on all of its sales proceeds because it wholesaled in Washington, and allows the state of manufacture also to tax part or all of those same receipts. Yet, this was the precise evil condemned by the Court in *Central Greyhound*.
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> * * * *
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> Regardless of how subsequent cases may view *Jefferson Lines*' implications for gross receipts taxes, the wisdom of requiring apportionment in many situations can be demonstrated by revisiting *Tyler Pipe*.

Hellerstein, at 100-101; 98-99.

Subsequent to *Jefferson Lines*, the Supreme Courts of both Alabama and Virginia have struck down unapportioned gross receipts taxes on interstate manufacturers as being in violation of the Commerce Clause. *M & Associates, Inc. v. City of Irondale*, 723 So.2d 592 (Ala. 1998); *Winchester v. American Woodmark Corp.*, 471 S.E.2d 495 (Va. 1996). *See also Kelley, Do Gross Recepits*

Taxes on Manufacturing Violate the Commerce Clause?, 8 WG&L J. Multistate Tax'n and Incentives, No. 1, at 17 (1998) ("Thus, an unapportioned manufacturing tax measured by gross receipts unfairly taxes the portion of the maufacturing business carried on out of state.").

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), this Court announced a four-part test that must be satisfied in order to uphold a tax against a Commerce Clause challenge:

1. The activity sought to be taxed must have a substantial nexus with the taxing state;
2. The tax must be fairly apportioned;
3. The tax must not discriminate against interstate commerce; and
4. The tax must be fairly related to services provided by the state.

430 U.S. at 279. In this case, the B&O tax scheme violates the *Complete Auto* 'fair apportionment' requirement and the prohibition against discriminating against interstate commerce.

The "central purpose" of the fair apportionment prong is to ensure that each state taxes only its fair share of an interstate transaction. *Goldberg v. Sweet*, 488 U.S. 252, 260-61 (1989). This principle derives from the Commerce Clause's historical prohibition of multiple taxation:

> This principle of fair share is the lineal descendant of *Western Live Stock's* [*Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938)] prohibition of multiple taxation, which is threatened whenever one State's act of overreaching combines with the possibility that another State will claim its fair share of the value taxed: the portion of the value by which one State exceeded its fair share would be taxed again by a State properly laying claim to it.

Oklahoma Tax Comm. v. Jefferson Lines, Inc., 514 U.S. 175, 184-85 (1995). It is just such overreaching by the State of Washington that creates the constitutional infirmity in this case.

The fair apportionment prong is measured by the internal consistency test and the external consistency test. *Goldberg*, 488 U.S. at 261. The internal consistency test is whether in theory the identical application of the tax by every state would place interstate commerce at a disadvantage as compared to intrastate commerce. *Jefferson Lines*, 514 U.S. at 185. The external consistency test is whether a state's tax reaches beyond that portion of the value that is fairly attributable to economic activity within the taxing state, and may be evidenced by the threat of real multiple taxation. *Id.* Both the internal consistency test and the external consistency test are violated in this case.

The Washington B&O tax scheme violates the internal consistency test because of the onerous and virtually unachievable recordkeeping requirements imposed on interstate businesses under the MATC. The MATC retroactively requires maintenance of extensive, product-and ingredient-specific records and contracts, as well as technical proof of the commonality between each jurisdiction's gross receipts tax scheme and Washington's. Conversely, intrastate businesses are entitled to an automatic MATC. This disparate treatment facially violates the Commerce Clause.

Washington's B&O tax scheme also violates the external consistency test because it taxes manufacturing, extracting, and wholesaling activities that occur in the state "without apportioning, or limiting, the tax to that part of the receipts attributable to value produced in [the] state only." *Grace*, 973 P.2d at 1036 (Sanders, J., dis-

senting). The B&O tax, even after taking into account the MATC, is based on value produced in other states and not just in Washington. The MATC itself requires interstate taxpayers to prove the amount and nature of taxes paid in other jurisdictions, but the required proof does not correspond to any reduction in the tax (only to the availability of the credit). As a result of Washington's failure to apportion the B&O tax, interstate taxpayers are overly burdened and the State of Washington is unduly enriched, in violation of the Commerce Clause. The Court should accept this opportunity to confirm that apportionment of gross receipts taxes is a constitutional mandate to taxing states.

CONCLUSION

Washington's B&O tax was unconstitutionally discriminatory before *Tyler Pipe*, was confirmed as unconstitutionally discriminatory in *Tyler Pipe*, and remains unconstitutionally discriminatory today:

> [T]he majority [in *Grace*] pays lip service to the commerce clause but does little to protect the freedom of interstate commerce and nothing to protect interstate taxpayers from the avaricious appetite of state taxing authorities which, even to this day, extort payment of unconstitutional taxes while overtly denying taxpayers their statutory defense to payment, as well as their statutory right to refund.

Grace, 973 P.2d at 1037 (Sanders, J., dissenting). The discriminatory MATC does nothing to cure the constitutional infirmities of the B&O tax, and to the contrary, serves as the State's convenient excuse to assess additional deficiencies under the unconstitutional tax. Petitioners urge the Court to grant the writ, cancel the unconstitutional retroactive deficiencies, strike down the MATC and the unconstitutional B&O tax scheme, and order the Washington Court to enter judgment for Petitioners.

The petition for a writ of certionari should be granted.

Respectfully submitted,

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June 30, 1999

APPENDICES

APPENDIX A

SUPREME COURT OF WASHINGTON
EN BANC

Nos. 64335-1, 65608-8

W.R. GRACE & CO.—CONN.; and
CHRYSLER MOTORS CORPORATION,
Appellants,
v.
STATE OF WASHINGTON, DEPARTMENT OF REVENUE,
Respondent.

BUFFELEN WOODWORKING COMPANY, *et al.*,
Appellants,
v.
STATE OF WASHINGTON, DEPARTMENT OF REVENUE,
Respondent.

Argued June 9, 1998

Decided April 1, 1999

TALMADGE, J.

This is our sixth,[1] and hopefully final, decision in the recent round of cases on the constitutionality of Wash-

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[1] *Tyler Pipe Indus. Inc. v. Department of Revenue*, 105 Wash.2d 318, 715 P.2d 123 (1986), *rev'd*, 483 U.S. 232, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987); *National Can Corp. v. Department of Revenue*, 105 Wash.2d 327, 732 P.2d 134 (1986) (*National Can I*), *rev'd*, 483 U.S. 232, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987); *National Can Corp. v. Department of Revenue*, 109 Wash.2d 878, 749 P.2d 1286,

ington's Business and Occupation (B & O) tax on interstate manufacturers and sellers. Yet again, we are asked if the United States Supreme Court opinion in *Tyler Pipe* applies retroactively and, if so, what remedies are available to taxpayers who paid B & O taxes under the unconstitutional tax scheme identified by the United States Supreme Court in that decision, particularly for those periods prior to June 23, 1987, the date of the issuance of the Court's opinion. We are also asked to decide if the various taxpayers (taxpayers) in these cases have standing to request relief or whether their cases are barred under principles of issue/claim preclusion.

Our prior decisions resolve the core issues in these cases. The holding of the United States Supreme Court in *Tyler Pipe* applies retroactively. Similarly, the legislative remedy for the unconstitutionality of Washington's B & O tax system enacted in 1987 [2] providing credits to those who paid the constitutionally defective tax applies retroactively as well. In light of our resolution of these issues, we do not reach the Department of Revenue's (DOR) standing or issue/claim preclusion issues, preserving those questions for trial court resolution on remand, as may be necessary.

ISSUES

1. Does *Tyler Pipe* apply retroactively?

2. Do taxpayers assert any viable grounds for revisiting the issue of the constitutionality of Washington's B & O tax scheme?

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cert. denied, 486 U.S. 1040, 108 S.Ct. 2030, 100 L.Ed.2d 615 (1988) (*National Can II*); *American Nat'l Can Corp. v. Department of Revenue*, 114 Wash.2d 236, 787 P.2d 545, *cert. denied*, 498 U.S. 880, 111 S.Ct. 213, 112 L.Ed.2d 173 (1990) (*American Nat'l Can*); *Digital Equip. Co. v. Department of Revenue*, 129 Wash.2d 177, 916 P.2d 933 (1996), *cert. denied*, 520 U.S. 1273, 117 S.Ct. 2452, 138 L.Ed.2d 210 (1997) (*Digital*).

[2] Laws of 1987, 2d Ex.Sess., ch. 3.

FACTS

The facts surrounding the constitutionality of Washington's B & O tax on interstate sales and manufacturing under the Commerce Clause of the United States Constitution have been amply discussed in our numerous prior opinions. We recount the specific facts of the taxpayers involved in these cases.

W.R. Grace (Grace) and Chrysler Corporation (Chrysler) were among a group of 71 taxpayers seeking refunds of B & O taxes in *National Can I*, claiming that the taxes they had paid violated the Commerce Clause. On June 23, 1987, the United States Supreme Court reversed in part and affirmed in part our decisions in *Tyler Pipe* and *National Can I*. *Tyler Pipe Indus., Inc. v. Department of Revenue*, 483 U.S. 232, 240, 107 S.Ct. 2810, 2816, 97 L.Ed.2d 199 (1987). The Court held that the "multiple activities exemption" in RCW 82.04.440 discriminated against interstate commerce, *Tyler Pipe*, 483 U.S. at 240-48, 107 S.Ct. 2810, but only partially invalidated the State's tax scheme, rejecting taxpayers' nexus and apportionment challenges to Washington's B & O tax, as we did. *Id.* at 248-51, 253, 107 S.Ct. 2810; *cf. National Can I*, 105 Wash.2d at 340-42, 732 P.2d 134; *Tyler Pipe*, 105 Wash.2d at 322-27, 715 P.2d 123; *see also American Nat'l Can*, 114 Wash.2d at 248, 787 P.2d 545. The Court remanded the case to us for resolution of the "remedial issues." *Tyler Pipe*, 483 U.S. at 253, 107 S.Ct. 2810. On remand, we held the Supreme Court's holding in *Tyler Pipe* applied prospectively only and denied the taxpayers like Grace and Chrysler any refunds for taxable activities before June 23, 1987, the date of the Supreme Court decision. *National Can II*, 109 Wash.2d at 895, 749 P.2d 1286. The United States Supreme Court dismissed the taxpayers' appeals from that decision. *Tyler Pipe*, 486 U.S. 1040, 108 S.Ct. 2030 (1988).

On August 11, 1987, Governor Booth Gardner signed a two-way credit law, the multiple activities tax credit (MATC), which was designed to eliminate the constitutional defects in Washington's B & O tax identified by the Supreme Court in *Tyler Pipe*. Laws of 1987, 2d Ex. Sess., ch. 3. Under the new law, all persons engaged in manufacturing activities in Washington must pay a manufacturing tax. All persons engaged in selling in Washington must pay a selling tax. Persons paying a selling tax may take a credit against that tax for any manufacturing tax paid to Washington or any other jurisdiction on the same product. In addition, persons paying a manufacturing tax and selling out-of-state can take a credit against that tax for any selling tax paid on the same product. Section 3 provided such credits were the exclusive remedy available to taxpayers in the event a court should deem relief appropriate regarding the former multiple activities exemption for any tax periods before the August 12, 1987 effective date of the law.[3]

Grace and Chrysler, along with many other taxpayers, next challenged the 1987 two-way credit law, as well as the retroactive application of the two-way credit to the seven-week "interim period" from June 23, 1987 through August 11, 1987, claiming the 1987 law "discriminates against interstate commerce, violates principles of equal protection, and violates their right to due process of law." *American Nat'l Can*, 114 Wash.2d at 241, 787 P.2d 545. In *American Nat'l Can*, we upheld the MATC and applied it retroactively to the interim period. We rejected

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[3] If it is determined by a court . . . that relief is appropriate for any tax reporting periods before the effective date of this act, in respect to [the multiple activities exemption] as it existed before the effective date of this act, it is the intent of the legislature that the credits . . . shall be applied . . . and that relief . . . be limited to the granting of such credits. Laws of 1987, 2d Ex.Sess., ch. 3, § 3.

the argument that because interstate taxpayers claimed only $1.3 million in credits between June 1987 and October 1988, the 1987 law had no practical effect. *Id.* at 240, 246-47, 787 P.2d 545.

In this most recent litigation, DOR imposed three final tax assessments against Grace, covering tax periods from January 1980 through December 1990, for unpaid taxes and interest. Grace filed a complaint in superior court for declaratory judgment, injunctive relief, and recovery of damages against the Governor, the Attorney General, the Director of DOR, and DOR, contending to the extent the defendants were seeking to collect B & O taxes for periods through June 23, 1987, the defendants were seeking to collect unconstitutional taxes in light of *Tyler Pipe*. Grace later voluntarily dismissed the three individual defendants. DOR answered, asserting affirmative defenses of issue preclusion based on Grace's involvement in *National Can II* and *American Nat'l Can*. DOR also pleaded a counterclaim for unpaid taxes, penalties, and interest.

Similarly, DOR assessed Chrysler for unpaid taxes and interest covering tax periods from January 1984 through June 1988. Chrysler timely filed an administrative appeal of the assessments, which under RCW 82.32.160 automatically prevented the assessments from becoming final until DOR acted on the appeal. While the administrative appeal was still pending, Chrysler filed a superior court action similar to Grace's seeking declaratory judgment, injunctive relief, and recovery of damages against the Attorney General, the Director, and DOR, and then subsequently withdrew its administrative appeal. Chrysler later filed an amended complaint seeking relief against DOR only, alleging Commerce Clause violations similar to those made by Grace. DOR again asserted issue preclusion based on Chrysler's participation in *National Can*

II and *American Nat'l Can*, and sought unpaid taxes, interest and penalties by counterclaim.

All of the parties filed motions for partial summary judgment. DOR sought dismissal of all claims based on issue preclusion, while the taxpayers' motions sought application of *Tyler Pipe* retroactively from its June 23, 1987 release date, and invalidation of B & O taxes imposed before and after such date. The trial court issued detailed memorandum opinions in the two actions applying *Tyler Pipe* retroactively, upholding the constitutionality of the 1987 MATC legislation and applying it retroactively, and remanding the cases to DOR to recompute the taxpayers' assessments in order to retroactively apply the two-way credit found at RCW 82.04.440. The trial court denied DOR's motions as to issue preclusion. The parties moved for reconsideration with Grace and Chrysler specifically arguing no penalties should be imposed against them.[4] In the meanwhile, our *Digital* decision was issued. The trial court requested additional briefing on the effect of the *Digital* decision. The trial court ultimately denied the parties' motions for reconsideration, ruled no penalties would be included in DOR's money judgments against the taxpayers, but that interest may be assessed, and concluded *Digital* confirmed its earlier ruling that *Tyler Pipe* applied retroactively. The various parties' appeals are now before us.

In December 1984, Buffelen Woodworking Company (Buffelen) filed a complaint in Thurston County Superior Court for refund of B & O taxes paid since January 1980 in violation of the Commerce Clause. Buffelen's action

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4 The taxpayers filed notices of appeal to this Court in July 1996, long before the trial court heard argument on the parties' respective motions for reconsideration. We consolidated the cases on appeal and stayed all appellate procedures until the trial court resolved the motions for reconsideration.

was one of nearly 100 similar refund actions filed that month alone in Thurston County Superior Court. *National Can I*, 105 Wash.2d at 329, 732 P.2d 134. More than 300 similar refund actions were originally filed between 1984 and 1990. In December 1993, plaintiff taxpayers in 104 of the remaining refund actions moved to consolidate the actions. DOR opposed the motion, but the trial court granted consolidation of 103 of the cases under the *Buffelen* [5] caption.

The taxpayers in the consolidated actions filed a joint motion for partial summary judgment contending *Tyler Pipe* retroactively invalidated taxes paid by appellants prior to June 1987 and they were entitled to full refunds of any unconstitutional taxes they might have paid. DOR moved to strike certain evidence offered in support of the taxpayers' motion.

Relying on its ruling in *Grace* and *Chrysler*, the trial court entered orders similar to its orders in those cases ruling that *Tyler Pipe* should be applied retroactively, but that refunds for pre-*Tyler Pipe* tax periods would be limited to credits for gross receipts taxes the taxpayers paid to other jurisdictions.[6] Because the taxpayers waived any refund claims based on such credits, the trial court awarded no tax refunds to any of them. DOR filed motions for reconsideration in both cases, which were denied. Both the taxpayers and DOR appealed. We granted

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[5] By 1997, only 47 of the 103 actions remained, the rest having been dismissed by stipulation or by motion of DOR. The trial court later granted motions to bring three more pending aactions, with a total of five plaintiffs, under the *Buffelen* caption.

[6] The trial court severed three plaintiffs, Anheuser-Busch, Inc., Apple Computer, Inc., and Herman Miller, Inc., allegedly with "place of sale claims," and consolidated their refund claims under the caption of *Anheuser-Busch, Inc. v. State*, No. 86-2-02675-1 (Thurston Co. Super. Ct. July 18, 1997). The court then entered summary judgments in *Anheuser-Busch* as well.

direct review. RAP 4.2(a)(4). For purposes of argument, *Grace/Chrysler* and *Buffelen/Anheuser-Busch* were treated as separate cases, but we resolve the issues in those cases in this single opinion.

ANALYSIS

As a preliminary matter, DOR has raised a number of procedural issues including standing, issue/claim preclusion, the propriety of the consolidation of cases in *Buffelen*, the designation of evidence relied upon in the summary judgment orders under CR 56(h)/RAP 9.12, and the admissibility of the affidavit of John Piper, one of the taxpayers' attorneys.

In light of the sheer volume of cases confronting the trial court, we give significant latitude to its efforts to process the many cases before it. First, CR 42(a) confers substantial discretion on trial courts with respect to consolidation of common questions of law or fact. DOR has failed to demonstrate the trial court abused its discreiton in consolidating the tax refund actions under the *Buffelen/Anheuser-Busch* captions. *Leader Nat'l Ins. Co. v. Torres*, 51 Wash.App. 136, 142, 751 P.2d 1252 (1988) ("CR 42(a) allows a court to consolidate actions which involve a common question of law or fact. Consolidation is within the discretion of the trial court and will be reversed only upon a showing of abuse and that the moving party was prejudiced."), *aff'd*, 113 Wash.2d 366, 779 P.2d 722 (1989). We affirm the trial court's consolidation order in *Buffelen* as DOR demonstrates no abuse of discretion by the trial court. *State v. Norby*, 122 Wash.2d 258, 265, 858 P.2d 210 (1993) (trial court's ruling consolidating cases is reviewed under the abuse of discretion standard); *Port of Seattle v. Equitable Capital Group, Inc.*, 127 Wash.2d 202, 213, 898 P.2d

275 (1995) (discretionary decision or order of the trial court will not be disturbed on review except on a clear showing of abuse, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons).

Second, with respect to the listing of evidence, DOR faults the summary judgment orders entered by the trial court in *Buffelen* and *Anheuser-Busch* because they do not include seven affidavits presented by DOR in the listing of evidence the trial court considered. However, because the trial court indicated it had indeed read six of the seven affidavits, and the affidavits are included in the record before us, DOR's assertion that CR 56(h) and RAP 9.12 require the listing of such evidence in the judgment is of no moment. Because the affidavits are included in the record on appeal, any error in failing to list the affidavits in the summary judgment order is harmless. *State v. Jackson*, 102 Wash.2d 689, 695, 689 P.2d 76 (1984) (an error, not of constitutional magnitude, is harmless if there is a reasonable probability that absent the error the result would have been the same).

Third, as to the Piper affidavit, the admissibility of evidence is within the discretion of the trial court. *See State v. Brown*, 132 Wash.2d 529, 571-72, 940 P.2d 546 (1997) (trial court's admission of evidence is reviewed for abuse of discretion), *cert. denied*, —— U.S. ——, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998). DOR asserts the trial court erred in refusing to strike the affidavits of John T. Piper, arguing the information contained therein is irrelevant and inadmissible. It further asserts nearly half the materials attached to the Piper affidavit are exact copies of evidence the taxpayers presented in *American Nat'l Can*; and, because the affidavits were offered to support taxpayers' renewed discrimination challenge to the MATC, from which taxpayers are precluded from reliti-

gating, the affidavits should have been stricken. As the trial court essentially found in DOR's favor on the issues the affidavit concerned (i.e., taxpayers' constitutional challenges to the MATC), we do not reach this issue. *State v. Gentry*, 125 Wash.2d 570, 616-17, 888 P.2d 1105, *cert. denied*, 516 U.S. 843, 116 S.Ct. 131, 133 L.Ed.2d 79 (1995) (purely academic discussions of moot issues are inappropriate).

Finally, the standing and issue/claim preclusion issues DOR raises are plainly the most significant and meritorious of its many procedural arguments. Grace and Chrysler were parties in both *National Can I/Tyler Pipe* and *American Nat'l Can*. The former case rejected taxpayers' apportionment argument and the latter case both noted the resolution of the apportionment claim in *Tyler Pipe* and rejected taxpayers' constitutional challenges to Washington's amended B & O tax scheme. *See Tyler Pipe*, 483 U.S. at 240, 248-53, 107 S.Ct. 2810; *American Nat'l Can*, 114 Wash.2d at 248-49, 787 P.2d 545.[7] Thus, with respect to many of the issues raised by the taxpayers, they may well have had their day in court on those issues, although the taxpayers assert that the United States Supreme Court jurisprudence on taxation and the Commerce Clause requires these issues to be re-examined.

DOR also contends a number of the plaintiff taxpayers in the *Buffelen* litigation failed to prove their standing to make the Commerce Clause challenges in those actions. We note, however, the trial court did not reach the standing issue because the substantive grounds upon which it ruled were dispositive of the case. Issues upon which the trial court has made no final determination are not ripe

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[7] Indeed, taxpayers in *American Nat'l Can* conceded Washington's B & O tax is fairly apportioned. *American Nat'l Can*, 114 Wash.2d at 248, 787 P.2d 545.

for review. *Department of Ecology v. Acquavella*, 131 Wash.2d 746, 759-60, 935 P.2d 595 (1997) (where the trial court made no finding whether an irrigation district had forfeited a portion of its water rights, that issue was not ripe for review).

To lay to rest, once and for all, any lingering uncertainty regarding the application of *Tyler Pipe* and the 1987 remedial legislation, we prefer to resolve the substantive issues of the constitutional defect in Washington's B & O tax system and remedies for such defect. We take this unusual step because of the unique circumstances of this case and the public importance of the issues here, and do not intend this exceptional approach to become the rule on review. *Schmidt v. Cornerstone Invs., Inc.*, 115 Wash.2d 148, 165-66, 795 P.2d 1143 (1990) (a reviewing court is not obliged to decide all the issues raised by the parties, but only those which are determinative). With respect to any issues of issue/claim preclusion and standing affecting individual parties, DOR's right to raise them to the trial court, if necessary, is fully preserved.[8]

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[8] Likewise, given our disposition of this case we deem it unnecessary at this time to address the preclusion issue decided by the trial court in *Grace/Chrysler*. Our review of this issue is specifically reserved however, should further review be required. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 277, 104 S.Ct. 3049, 3058, 82 L.Ed.2d 200 (1984) (noting remand to state courts for further proceedings is appropriate where "the federal constitutional issues involved may well be intertwined with, or their consideration obviated by, issues of state law"); *Fulton Corp. v. Faulkner*, 516 U.S. 325, 347, 116 S.Ct. 848, 862, 133 L.Ed.2d 796 (1996) (citing *Bacchus*, remanding for determination of whether taxpayer complied with state law procedural requirements); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544, 111 S.Ct. 2439, 2448, 115 L.Ed.2d 481 (1991) (remanding for further proceedings, citing *Bacchus*, holding that the Court's ruling, requiring a rule of law be applied equally to all litigants who are not barred by procedural requirements or res judicata, did not deprive re-

A. *Tyler Pipe* Applies Retroactively

DOR argues *Tyler Pipe*'s invalidation on commerce clause grounds of former RCW 82.04.440, exempting in-state manufacturers of goods sold in this state but not other manufacturers, does not apply retroactively to tax periods prior to June 23, 1987. We have already ruled on this issue, however, in *Digital*, holding the *Tyler Pipe* decision to apply retroactively.

Although we issued three opinions in *Digital*, we held *Tyler Pipe* applies retroactively. As we recently held in *Davidson v. Hensen*, 135 Wash.2d 112, 128, 954 P.2d 1327 (1998), "[w]here there is no majority agreement as to the rationale for a decision, the holding of the court is the position taken by those concurring on the narrowest grounds." While expressing different reasoning for their conclusions, five members of this Court, in the lead and concurring opinions, indicated *Tyler Pipe* applies retroactively. *Digital Equip. Corp. v. Department of Revenue*, 129 Wash.2d 177, 188, 916 P.2d 933 ("To the extent our decision in *National Can II* holds that *Tyler Pipe* applies only on a prospective basis, we overrule it." (Smith, J., majority op.); "*Tyler Pipe* must be applied retroactively to tax periods predating its pronouncement[.]" *Id.* at 194, 916 P.2d 933. *See also id.* at 195, 916 P.2d 933, Durham, C.J., concurring opinion, agreeing with the majority's decision to overrule *National Can II*'s determination *Tyler Pipe* would apply only prospectively, and clearly concluding "I would hold that . . . *Tyler Pipe* applies retroactively. . . ." *Id.* at 205, 916 P.2d 933.) The five-member decision in *Digital* is controlling on the issue of retroactivity. On principles of

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spondents of their opportunity to raise procedural bars to recovery under state law).

stare decisis, we affirm the trial court's decision on this issue.[9]

B. Remedy for Washington's Constitutionally Defective B & O Tax

The taxpayers assert Washington's B & O tax is a nullity and they do not have to pay any B & O taxes whatsoever. They renew certain commerce clause challenges to application of the 1987 MATC credit, alleging the credit discriminates against interstate commerce and fails to properly apportion the B & O tax to interstate and intrastate activities of taxpayers. They also assert the MATC credit offends due process as both a "bait and switch" tactic forbidden by the United States Constitution, and by reaching too far back in time.

1. Washington's B & O Tax Scheme is Not A Nullity

The taxpayers argue the United States Supreme Court's decision in *Tyler Pipe* rendered that tax a nullity, totally void from its inception, and incapable of being cured by any legislative amendment. Therefore, they argue, they do not have to pay any B & O taxes whatsoever. They rely on antiquated Supreme Court authority, *Norton v. Shelby County*, 118 U.S. 425, 6 S. Ct. 1121, 1125, 30 L.Ed. 178 (1886),[10] and our statement in *Boeing Co. v.*

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[9] *See State v. Gentry*, 125 Wash.2d 570, 587 n. 12, 888 P.2d 1105 (writing justice whose dissenting views in prior case were not accepted by majority of the court was bound by doctrine of stare decisis to accede to the view of the majority on that issue in subsequent case), *cert. denied*, 516 U.S. 843, 116 S.Ct. 131, 133 L.Ed.2d 79 (1995).

[10] The "void ab initio" doctrine upon which taxpayers rely, as expressed in *Norton*, has been abandoned by the Supreme Court. *See Lemon v. Kurtzman*, 411 U.S. 192, 197-99, 93 S.Ct. 1463, 1468-69, 36 L.Ed.2d 151 (1973) (recognizing the abandonment of *Norton*); *Ryan v. County of DuPage*, 45 F.3d 1090, 1094 (7th Cir. 1995) (same).

State, 74 Wash.2d 82, 88-89, 442 P.2d 970 (1968) of the general rule that an invalid statute is a nullity. However, controling law on this issue is found in a more recent United States Supreme Court precedent, which we have specifically adopted.

In *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 110 S. Ct. 2238, 110 L.Ed.2d 17 (1990), the United States Supreme Court recognized where a State imposes an unconstitutional tax that is not beyond the power of the legislature to impose or does not fall on persons immune from taxation, the state legislature may modify the offending statute retroactively to correct the constitutional defect. In *McKesson*, the Court struck down a Florida liquor tax statute which favored in-state products. However, the Court did not treat the statute as a nullity:

> a State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination. Florida may reformulate and enforce the Liquor Tax during the contested tax period in any way that treats petitioner and its competitors in a manner consistent with the dictates of the Commerce Clause. Having done so, the State may retain the tax appropriately levied upon petitioner pursuant to this reformulated scheme because this retention would deprive petitioner of its property pursuant to a tax scheme that is valid under the Commerce Clause.

McKesson, 496 U.S. at 39-40, 110 S.Ct. 2238. Similarly, in *Associated Indus. v. Lohman*, 511 U.S. 641, 114 S.Ct. 1815, 128 L.Ed.2d 639 (1994), the Court stated:

> That we have declared the tax scheme impermissibly discriminatory in some localities does not in itself dictate the relief that the State must provide. As we noted in *McKesson Corp. v. Division of Alco-*

> *holic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18, 39-40 [, 110 S.Ct. 2238, 2252, 110 L.Ed.2d 17] (1990), a "State found to have imposed an impermissibly discriminatory tax retains flexibility in responding to this determination." . . . [T]he Due Process Clause would demand only that, "to cure the illegality of the tax as originally imposed, the State must ultimately collect a tax for the contested tax period that in no respect impermissibly discriminates against interstate commerce." Id., at 44, n.27[, 110 S.Ct. at 2254 n.27]. The methods best adapted to achieving equal treatment in this case, whether partial or complete refunds or other measures, are similarly matters properly left for determination on remand.

Lohman, 511 U.S. at 656, 114 S.Ct. 1815. *See also Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 755, 115 S.Ct. 1745, 1750, 131 L.Ed.2d 820 (1995) (citing *McKesson*, noting the "special circumstances" of tax cases involving a particular kind of constitutional violation, a discriminatory tax, which the state may cure without repaying back taxes).

In *American Nat'l Can* we acknowledged the dual purpose of the 1987 curative legislation to both establish parity among taxpayers and preserve the integrity of the B & O tax system, finding the new tax law constitutional. *American Nat'l Can*, at 247-49, 787 P.2d 545. We specifically adopted the *McKesson* analysis in *Digital*, at 189-91, 916 P.2d 933, holding the 1987 legislation cured any constitutional defect in Washington's B & O tax. We adhere again to those rulings: Washington's B & O tax is not a nullity because of the defects identified in *Tyler Pipe* where the 1987 remedial legislation cures such constitutional defects.

2. Taxpayers Commerce Clause Arguments Are Meritless

Taxpayers asert Washington's B & O tax, including the curative 1987 MATC, and that provision's reporting requirements, discriminates against interstate commerce. They also claim "[a]pportionment is the only permanent cure for the discrimination manifest in Washington's B & O Tax." G. Appellants' Br. at 41, B. Appellants' Br. at 31.

We put to rest taxpayers' discrimination and other constitutional challenges in *American Nat'l Can,* holding the 1987 MATC does not discriminate against interstate commerce, nor does it offend the requirements of equal protection or due process in curing any constitutional defects in Washington's B & O tax. *Id.* at 248-53, 787 P.2d 545. We also acknowledged the apportionment issue has been settled.

> A long line of precedent has held that Washington's B & O tax meets the fair apportionment test. [Citations omitted.] This court ruled that the B & O tax without the 2-way credit posed no apportionment problem in *National Can Corp. v. Department of Rev.,* 105 Wash.2d 327, 340-42, 732 P.2d 134 (1986). The Supreme Court did not disagree. Indeed, it rejected Tyler's fair apportionment challenge to the wholesale tax. *Tyler,* 483 U.S. at 253, 107 S.Ct at 2823.

American Nat'l Can, 114 Wash.2d at 248, 787 P.2d 545. *See also Harper v. Virginia Dep't of Taxation,* 509 U.S. 86, 100-02, 113 S.Ct. 2510, 2519-20, 125 L.Ed.2d 74 (1993) (state may craft a remedy in response to determination that it has imposed a tax that discriminates against interstate commerce).

Taxpayers ask us to ignore our own and the United States Supreme Court's rulings and revisit the apportion-

ment issue. Relying on a law review article criticizing the Sureme Court's approach in several cases.[11] including *Tyler Pipe*, as inconsistent with *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995), the taxpayers urge us to seize this opportunity to apply *Jefferson Lines* and correct what they see as a misconceived analogy between the retail sales tax and gross receipts taxes.

We believe the taxpayers reliance on *Jefferson Lines* is misplaced. Nothing in that case purports to overturn or limit *Tyler Pipe*, including *Tyler Pipe's* rejection of an apportionment challenge to Washington's B & O tax. Noting that *Tyler Pipe* struck down Washington's gross receipts wholesaling tax exempting in-state, but not out-of-state, manufacturers, the United States Supreme Court went on to explain:

> Although we have not held that a State imposing an apportioned gross receipts tax that grants a credit for sales taxes paid in-state must also extend such a credit to sales taxes paid out-of-state, we have noted that equality of treatment of interstate and intrastate activity has been the common theme among the paired (or "compensating") tax schemes that have passed constitutional muster. We have indeed never upheld a tax in the face of a substantiated charge that it provided credits for the taxpayer's payment of in-state taxes but failed to extend such credit to payment of equivalent out-of-state taxes. To the contrary, in upholding tax schemes providing credits for taxes paid in-state and occasioned by the same transaction, we have often pointed to the concomitant credit provisions for taxes paid out of state

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11 Walter Hellerstein et al., Commerce Clause Restraints on State Taxation After *Jefferson Lines*, 51 Tax L.Rev. 47 (1995).

> as supporting our conclusion that a particular tax passed muster because it treated out-of-state and in-state taxpayers alike. A general requirement of equal treatment is thus amply clear from our precedent. We express no opinion on the need for equal treatment when a credit is allowed for payment of in- or out-of-state taxes by a third party.

Jefferson Lines, 514 U.S. at 192 n.6, 115 S.Ct. 1331 (citations omitted). The taxpayers' premise that *Jefferson Lines* implicitly struck down or limited *Tyler Pipe* is inaccurate. *Jefferson Lines* also approves a credit for taxes paid out-of-state as provided by the MATC. We believe the guidelines enunciated by the United States Supreme Court in *McKesson* remain the applicable law here. We adhere again to our rulings in *American Nat'l Can* and *Digital* which comport with *McKesson*. The 1987 MATC cures the unconstitutional impact of Washington's B & O tax on interstate commerce identified by the United States Supreme Court in *Tyler Pipe*.

3. Application of the 1987 MATC Does Not Offend Due Process

The taxpayers also assert because the B & O tax was found unconstitutional in *Tyler Pipe*, anything less than either the enjoining of the collection of taxes pursuant to RCW 82.32.150, or the full refund of taxes paid, amounts to a "bait and switch" which offends due process principles. They contend that the exclusive remedy feature of the 1987 remedial legislation deprives them of the statutory oportunity to enjoin collection of the unconstitutional tax, or have such taxes refunded. But the authority they cite, *Newsweek, Inc. v. Florida Dep't of Revenue*, 522 U.S. 442, 118 S.Ct. 904, 139 L.Ed.2d 888 (1998) does not appear to advance their position.

Newsweek (citing *Reich v. Collins*, 513 U.S. 106, 115 S.Ct. 547, 130 L.Ed.2d 454 (1994)), holds that where Florida law provided a taxpayer with a choice of either prepayment or postpayment challenges to an assessed tax, it violated due process to deprive a taxpayer of the postpayment challenge option where he had paid the assessed taxes while reasonably relying on the availability of such option. The taxpayers here have not been deprived of the opportunity to challenge the Washington B & O tax scheme, as the taxpayers' many appearances before us challenging Washington's B & O tax attest. *See also McKesson*, 496 U.S. 18, 110 S.Ct. at 2252 ("In the end, the State's postdeprivation procedure would provide petitioner with all of the process it is due: an opportunity to contest the validity of the tax and a 'clear and certain remedy' designed to render the opportunity meaningful by preventing any permanent unlawful deprivation of property."). The taxpayers have a right to challenge the imposition of an unconstitutional tax and such a right is preserved both in prepayment or postpayment settings. As we previously determined, credits provided in the 1987 remedial statute are the appropriate remedy in this instance.[12]

We have specifically rejected taxpayers' argument that "the 1987 credit law, as an exclusive remedy, does not meet the requirements of federal due process." *Digital*,

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[12] At oral argument, taxpayers asserted that *Reich*, *Newsweek* and *Dryden v. Madison County*, —— U.S. ——, 118 S.Ct. 1162, 140 L.Ed.2d 173 (1998), an opinion which vacated a Florida Supreme Court decision and remanded in light of *Newsweek*, are dispositive of this case, suggesting the Supreme Court has retreated from the approach it announced in *McKesson*. However, none of these cases addresses a credit provision analogous to this case. Furthermore, these cases, read together with *Lohman* and *Reynoldsville Casket*, do not indicate the Supreme Court has either abandoned the "flexibility" it enuncitaed in *McKesson*, nor reversed itself regarding the credits it stated in *Tyler Pipe* would cure the defect in Washington's B & O tax.

129 Wash.2d at 189, 190, 916 P.2d 933. Moreover, it is difficult to envision that the taxpayers "bait and switch" argument carries any strength when the United States Supreme Court specifically approved the credit remedy set forth in the 1987 remedial legislation. *Tyler Pipe*, 483 U.S. at 249, 107 S.Ct. 2810. *See also McKesson*, 496 U.S. at 39-40, 110 S.Ct. 2238. *Harper*, 509 U.S. at 100-01, 113 S.Ct. 2510 (noting federal law does not necessarily mandate refund of a tax found to be impermissibly discriminatory, and that states retain flexibility to craft a remedy which satisfies federal due process).

We next turn to the question of the retroactive application of the 1987 remedial legislation. The trial court here held the 1987 curative legislation applied retroactively and cured any defects in the Washington B & O tax. The taxpayers argue retroactive application of the 1987 curative legislation offends due process because it reaches back too far in time, citing *Welch v. Henry*, 305 U.S. 134, 59 S.Ct. 121, 83 L.Ed. 87 (1938) (approving a two year retroactive application of a tax statute); *State v. Pacific Tel. & Tel. Co.*, 9 Wash.2d 11, 17, 113 P.2d 542, 545 (1941) (striking a four year period of tax statute retroactivity); and *United States v. Carlton*, 512 U.S. 26, 114 S.Ct. 2018, 129 L.Ed.2d 22 (1994) (approving a slightly greater than one year retroactive application of a tax statute).

We have already decided this issue as well. In *American Nat'l Can*, we applied the 1987 legislation retroactively to the so-called interim period of June 23, 1987, the date of the *Tyler Pipe* decision, to August 11, 1987, the effective date of the 1987 legislation. *American Nat'l Can*, 114 Wash.2d at 253, 787 P.2d 545. In *Digital*, we went an additional step and rejected a due process challenge to the 1987 curative legislation, denying *Digital's* request for a refund of B & O taxes paid between Janu-

ary 1, 1983, and August 11, 1987, in effect applying the 1987 legislation retroactively for a period of some four and a half years. We stated:

> Retroactive application of the 1987 credit law, designed to cure the constitutional infirmities of the B & O tax exemption scheme, satisfies the requirements of federal due process as a postdeprivation remedy. By providing manufacturers with tax credits for unconstitutional taxes paid, a clear and certain remedy is provided which cures the unconstitutional deprivation by equalizing the tax disparity between those manufacturers and manufacturers who were not subjected to the unconstitutional B & O taxes.

Digital, 129 Wash.2d at 194-95, 916 P.2d 933.[13] Our *Digital* decision on retroactivity is consistent with the legislative intent expressed in § 3 of the 1987 act to apply the MATC retroactively, if necessary, to cure any problems with Washington's B & O tax. Laws of 1987, 2d Ex.Sess., ch. 3, § 3.

Our holding in *Digital* finds support in federal case law. In *Welch*, the United States Supreme Court upheld retroactive application of a 1935 Wisconsin income tax on dividends received in 1933, relying on well established precedent holding "a tax is not necessarily unconstitutional because retroactive [,]" 305 U.S. at 146, 59 S.Ct. 121, and noting similar contexts in which due process challenges to tax statutes had been rejected. 305 U.S. at 149, 59 S.Ct. 121.

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[13] With the exception of *Newsweek* and *Dryden*, our determination in *Digital* postdates the authority relied upon by taxpayers. In *Digital*, as in our other post-*Tyler Pipe* cases, we continue to rely and build upon the pronouncements of the Supreme Court in *Tyler Pipe* (see n. 12 above). Absent a clear directive from that Court to do otherwise, we will continue to rely on the roadmap provided to us in *Tyler Pipe*. Thus, *Digital* is dispositive of taxpayers' due process challenge.

In *Temple University v. United States*, 769 F.2d 126 (3d Cir. 1985), *cert. denied*, 476 U.S. 1182, 106 S.Ct. 2914, 91 L.Ed.2d 544 (1986), the Third Circuit relied on *Welch* in rejecting taxpayers due process challenge to 1984 curative legislation which cut off taxpayers claim for FICA tax refunds reaching back to 1979. The Third Circuit held (1) Congress may, without violating the due process clause, enact legislation having retroactive application if it is justified by a rational legislative purpose, (2) when such legislation is "curative" in character the retroactive application is entitled to be liberally construed, and (3) courts afford greater tolerance toward retroactive application of laws which coincide with long-standing public policy. *Id.* at 134, 59 S.Ct. 121.

In reaching its conclusion the Third Circuit discussed the implications of *Welch*, disagreeing with some state courts which applied *Welch* narrowly in declaring unconstitutional tax statutes which reached back in time more than one year prior to the statute's enactment. Noting the Supreme Court has never actually prohibited such retroactivity, the Third Circuit found compelling the flexible standard provided in *Welch*, coupled with the fact the Supreme Court had spoken only in general terms, permitting an income tax statute to be retroactively applied to "recent transactions," and no federal court of appeals had yet adopted an absolute temporal limitation on retroactivity.

> We find some guidance in the rather flexible criteria delineated by the Court in *Welch v. Henry*: "In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation." 305 U.S. at 147, 59 S.Ct. at 126. The federal courts have generally interpreted

these criteria as indicating that "[r]etroactive operation is constitutional where it is not harsh, arbitrary or unfair." An amplification of this principle is provided by an earlier case:

> The decisive test in this instance is whether this taxpayer has had its expectations as to taxation unreasonably disappointed. . . . [R]etroactive taxation is not so arbitrary and oppressive as to be unconstitutional if it is no more burdensome than the taxpayer should have expected it to be when he did the thing which created the tax liability. . . . And when it is not, whether the period of retroactivity is comparatively long or short is of little consequence provided it isn't too long to be within reason.

Temple, 769 F.2d at 135 (alteration in original) (citations and footnotes omitted). As in *Temple*, it cannot be said taxpayers here have had their "expectations as to taxation unreasonably disappointed," or retroactive application of the 1987 curative credit, designed to benefit taxpayers, has made their tax liability more burdensome.

In *Carlton*, the Supreme Court again emphasized retroactive tax legislation has been repeatedly upheld against a due process challenge, 512 U.S. at 30, 114 S.Ct. 2018, and explained the key inquiry as follows:

> Some . . . decisions have stated that the validity of a retroactive tax provision under the Due Process Clause depends upon whether "retroactive application is so harsh and oppressive as to transgress the constitutional limitation." The "harsh and oppressive" formulation, however, "does not differ from the prohibition against arbitrary and irrational legislation" that applies generally to enactments in the sphere of economic policy. The due process standard to be applied to tax statutes with retroactive effect,

therefore, is the same as that generally applicable to retroactive economic legislation:

> "Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches. . . .
>
> "To be sure, . . . retroactive legislation does have to meet a burden not faced by legislation that has only future effects. . . . 'The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former' . . . . But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose."

Carlton, 512 U.S. at 30-31, 114 S.Ct. 2018 (citations omitted) (emphasis added). We have previously approved the motives of the legislature as proper in enacting the 1987 credit law to establish parity among taxpayers. *American Nat'l Can*, 114 Wash.2d at 248, 787 P.2d 545. Thus, the rational legislative purpose which *Carlton* requires is present.

The United States Supreme Court has not set a specific duration to the retroactive effect of tax legislation, preferring to rely on legislative decisions in this context. We adhere to our prior rulings in *American Nat'l Can* and *Digital*: retroactive application of the 1987 remedial legislation is called for by the statute and does not offend constitutional principles.

CONCLUSION

The time has come for this litigation to end. More than a decade ago in *Tyler Pipe,* the United States Supreme Court found Washington's B & O tax, as it applies to interstate sales and manufacturing, to offend the Commerce Clause. The *Tyler Pipe* decision applies retroactively.

Within two months of the *Tyler Pipe* decision the Legislature responded by enacting remedial legislation. That 1987 MATC legislation addressed the constitutional defects in the fashion specifically suggested by the United States Supreme Court itself. We reject here, as we have done previously, the taxpayers' commerce clause and due process challenges to the MATC. As cured by the MATC, Washington's B & O tax on interstate sales and manufacturing is not a nullity. The taxpayers' relief is limited to MATC credits. Thus, we apply the 1987 curative legislation retroactively. Such a retroactive application comports with the statutory directive and does not offend due process principles.

We affirm the trial court judgments on these key points and remand the cases to the trial court for further action consistent with this opinion.

GUY, C.J., and DURHAM, SMITH, JOHNSON, ALEXANDER, JJ., and DOLLIVER, J.P.T., concur.

SANDERS, J. (dissenting).

While the majority asserts "[t]he time has come for this litigation to end" (Majority at 1022), the time this matter should end is the time our state respects the constitutional rights [1] of its taxpayers and the time this court provides an adequate remedy for those whose rights have been violated. Unfortunately, that time has yet to come.

At their core the facts are relatively simple: we have an unapportioned business and occupation tax on gross receipts which, at least prior to the effective date of its amendment on August 11, 1987, violated the interstate commerce clause. Quite understandably the government wants to keep the moneys collected from this unconstitutional tax; in fact it wants to collect even more! Less understandably this court will not put a stop to it.

The question may be divided into two parts: the appropriate remedy due interstate taxpayers for preamendment taxes alleged due but unpaid and/or actually paid; and whether the 1987 amendment effectively cured the commerce clause deficiency so as to eliminate the necessity to provide a remedy for post-1987 tax periods.

I submit proper resolution of this case depends entirely on the nature and effect of the 1987 amendatory act [2] (hereinafter "1987 act"), for existing state statutes clearly provide (1) the State may not lawfully require payment

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1 "[T]here is much more than a formal link between the federalism-based idea of shielding persons from the parochial forces of localism and the broader notion of protecting individuals against unfair and oppressive action by the state." Laurence H. Tribe, American Constitutional Law 402 (2d ed. 1988) (footnote omitted).

2 Laws of 1987, 2d Ex.Sess., ch. 3, partially codified at RCW 82.04.440.

of an unconstitutional tax;[3] (2) collection of an unconstitutional tax may be enjoined;[4] and (3) unconstitutional taxes actually paid must be refunded.[5]

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[3] RCW 82.04.4286:

Deductions—Nontaxable business. In computing tax there may be deducted from the measure of tax amounts derived from business which the state is prohibited from taxing under the Constitution of this state or the Constitution or laws of the United States.

[4] RCW 82.32.150:

Contest of tax—Prepayment required—Restraining orders and injunctions barred. All taxes, penalties, and interest shall be paid in full before any action may be instituted in any court to contest all or any part of such taxes, penalties, or interest. No restraining order or injunction shall be granted or issued by any court or judge to restrain or enjoin the collection of any tax or penalty or any part thereof, except upon the ground that the assessment thereof was in violation of the Constitution of the United States or that of the state.

[5] RCW 82.32.060:

Excess payment of tax, penalty, or interest—Credit or refund —Payment of judgments for refund. (1) If, upon receipt of an application by a taxpayer for a refund or for an audit of the taxpayer's records, or upon an examination of the returns or records of any taxpayer, it is determined by the department that within the statutory period for assessment of taxes, penalties, or interest prescribed by RCW 82.32.050 any amount of tax, penalty, or interest has been paid in excess of that properly due, the excess amount paid within, or attributable to, such period shall be credited to the taxpayer's account or shall be refunded to the taxpayer, at the taxpayer's option. Except as provided in subsections (2) and (3) of this section, no refund or credit shall be made for taxes, penalties, or interest paid more than four years prior to the beginning of the calendar year in which the refund application is made or examination of records is completed.

(2) The execution of a written waiver under RCW 82.32.050 or 82.32.100 shall extend the time for making a refund or credit of any taxes paid during, or attributable to, the years covered by the waiver if, prior to the expiration of the waiver period, an application for refund of such taxes is made by the

I fundamentally differ with my colleagues in a number of respects:

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taxpayer or the department discovers a refund or credit is due.

(3) Notwithstanding the foregoing limitations there shall be refunded or credited ot taxpayers engaged in the performance of United States government contracts or subcontracts the amount of any tax paid, measured by that portion of the amounts received from the United States, which the taxpayer is required by contract or applicable federal statute to refund or credit to the United States, if claim for such refund is filed by the taxpayer with the department within one year of the date that the amount of the refund or credit due to the United States is finally determined and filed within four years of the date on which the tax was paid: PROVIDED, That no interest shall be allowed on such refund.

(4) Any such refunds shall be made by means of vouchers approved by the department and by the issuance of state warrants drawn upon and payable from such funds as the legislature may provide. However, taxpayers who are required to pay taxes by electronic funds transfer under RCW 82.32.080 shall have any refunds paid by electronic funds transfer.

(5) Any judgment for which a recovery is granted by any court of competent jurisdiction, not appealed from, for tax, penalties, and interest which were paid by the taxpayer, and costs, in a suit by any taxpayer shall be paid in the same manner, as provided in subsection (4) of this section, upon the filing with the department of a certified copy of the order or judgment of the court.

(a) Interest at the rate of three percent per annum shall be allowed by the department and by any court on the amount of any refund, credit, or other recovery allowed to a taxpayer for taxes, penalties, or interest paid by the taxpayer before January 1, 1992. This rate of interest shall apply for all interest allowed through December 31, 1998. Interest allowed after December 31, 1998, shall be computed at the rate as computed under RCW 82.32.050(2). The rate so computed shall be adjusted on the first day of January of each year for use in computing interest for that calendar year.

(b) For refunds or credits of amounts paid or other recovery allowed to a taxpayer after December 31, 1991, the rate of interest shall be the rate as computed for assessments under RCW 82.32.050(2). The rate so computed shall be adjusted on the first day of January of each year for use in computing interest for that calendar year.

First, the multiple activities tax credit provision in the 1987 act does not establish any obligation to pay any portion of the unconstitutional tax against which the credit may apply. Second, the 1987 act is prospectively effective from August 11, 1987, not retroactive to the beginning of time. Notwithstanding the expressed legislative intention set forth in section 3 of the 1987 act to restrict taxpayer remedies for prior tax periods to credits only, section 3 does not retroactively amend the substance of the preexisting B & O tax. Therefore the constitutional deficiency is not retroactively cured—even if we assume a retroactive amendment could ever resurrect an unconstitutional statute.

Third, this legislative effort to deny taxpayers their clearly defined preexisting statutory remedies against payment or refund of an unconstitutional tax deprives those taxpayers their property absent that process due by not only denying them a "clear and certain remedy" for the deprivation but also employing an unconstitutional "bait and switch" tactic.

Fourth, the 1987 act's tax credit scheme unconstitutionally discriminates against interstate commerce because tax credits for interstate business are nearly impossible to prove in practice; and the imposition of such a burden of proof, which depends on the tax laws of other states, is unconstitutional in theory.

Fifth, the Washington B & O tax, a tax on gross receipts, violates the commerce clause on its face because it is not apportioned to in-state value-producing activity, but taxes out-of-state activity as well.

Assuming even one of the aforementioned disagreements with the majority is well founded in fact and law, these taxpayers are entitled to the full measure of the relief they request, not a farthing less.

I. Statutory availability of tax credits does not defeat defense to underlying tax obligation, nor establish obligation, nor establish obligation to pay an unconstitutional tax

Section 3 of the amendatory act provides:

> If it is determined by a court of competent jurisdiction, in a judgment not subject to review, that relief is appropriate for any tax reporting periods before the effective date of this act, in respect to RCW 82.04.440 as it existed before the effective date of this act, it is the intent of the legislature that the credits provided in RCW 82.04.440 as amended by section 2 of this act shall be applied to such reporting periods and that relief for such periods be limited to the granting of such credits. Laws of 1987, 2d Ex.Sess., ch. 3, § 3 (emphasis added).

Section 3's reference to "the credits provided in RCW 82.04.440 as amended by section 2 of this act" is a scheme of multiple activities tax credits (MATC) whereby interstate taxpayers may credit qualifying taxes paid in other jurisdiction against their Washington B & O tax obligation, provided: "The amount of the credit shall not exceed the tax liability arising under this chapter with respect to the sale . . . manufacturing . . . [or] extraction . . . of those products." RCW 82.04.440(2), (3), (4). This statute implements a garden variety tax credit scheme where it is first necessary to establish and compute the tax liability before that liability can be reduced by setting off available credits.[6]

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[6] "In taxation, credits reduce the tax liability as computed, as opposed to deductions which reduce the taxable income. Examples of tax credits include: credit for child and dependent care expenses, credit for the elderly or permanently disabled, etc." Black's Law Dictionary 367 (6th ed. 1990).

Plainly section 3 of the 1987 act is not inconsistent on its face with the assertion by interstate taxpayers that there are no taxes lawfully due for the pre-August 11, 1987 tax periods, regardless whether these taxpayers are entitled to apply any statutory tax credits. Axiomatically if no taxes are due for any tax period in question proceedings to establish or contest the availability of a credit against a $0 tax obligation are a waste of time for all concerned.

I posit there is indeed no such tax obligation because (1) the 1987 preamendment tax was found unconstitutional in *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987); (2) *Tyler Pipe*, as concedes the majority, applies retroactively (Majority at 1017);[7] (3) the 1987 act does not retroactively amend the substance of preexisting tax law; and (4) any unconstitutional statute, including a taxing statute, is invalid.

The first two points are self-evident and/or conceded by the majority. The third point will be discussed in the next section. I would have assumed the fourth point is also self-evident but for the fact the majority has engaged in such a complex analysis to reach a result favorable to the state tax collector. Therefore let us repair to those fundamentals of statutory invalidity to test the majority's

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[7] *See also Digital Equip. Corp. v. Department of Revenue*, 129 Wash.2d 177, 188, 916 P.2d 933 (1996), *cert. denied*, 520 U.S. 1273, 117 S.Ct. 2452, 138 L.Ed.2d 210 (1997). Moreover I concur specifically with the majority's view that *Tyler Pipe* applies retroactively as "prospective decisionmaking is the handmaid of judicial activism, and the born enemy of stare decisis," *Harper v. Department of Taxation*, 509 U.S. 86, 105, 113 S.Ct. 2510, 2522, 125 L.Ed.2d 74 (1993) (Scalia, J., concurring), as "[constitutional] meaning is changeless; it is only [its] application which is extensible." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 451, 54 S.Ct. 231, 78 L.Ed. 413, 88 A.L.R. 1481 (1934) (Sutherland, J., dissenting).

conclusion that one may be compelled to pay an unconstitutional tax.

It was no less than Chief Justice John Marshall who observed, "[A]n act of the legislature, repugnant to the constitution, is void." *Marbury v. Madison*, 5 U.S. 137, 176, 1 Cranch 137, 2 L.Ed. 60 (1803). Were it necessary to find further justification for the Chief Justice, Alexander Hamilton provided exactly that in Federalist No. 78 wherein he opined, prior to the ratification of our national character:

> No legislative act therefore contrary to the constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorise, but what they forbid.

The Federalist No. 78 (Alexander Hamilton) (May 28, 1788), reprinted in The Federalist Papers by Alexander Hamilton, James Madison, and John Jay 395-96 (Garry Wills ed., 1982).

Later judicial generations have also pledged their fidelity to this principle. In *Norton v. Shelby County*, 118 U.S. 425, 6 S.Ct. 1121, 30 L.Ed. 178 (1886), for example, the United States Supreme Court repeated

> An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.

Id. at 442, 6 S.Ct. 1121. And our court is in accord. *See, e.g., Drum v. University Place Water Dist.*, 144 Wash. 585, 258 P. 505 (1927), *aff'd*, 147 Wash. 699,

266 P. 1056 (1928); *Boeing Co. v. State*, 74 Wash.2d 82, 88, 442 P.2d 970 (1968) ("It is the rule [under Washington law] that an invalid statute is a nullity. It is as inoperative as if it had never been passed."); *City of Seattle v. Grundy*, 86 Wash.2d 49, 50, 541 P.2d 994 (1975) ("A statute or ordinance which is void as being in conflict with a prohibition contained in the constitution is of no force and effect."). *See also* 16A Am. Jur. 2d Constitutional Law § 203 (1998) ("[A]n unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed and never existed.") (footnotes omitted).

Notwithstanding this weighty authority in support of what lesser minds might conclude to be a simple truth, the majority responds that "controlling law on this issue is found in a more recent United States Supreme Court precedent." Majority at 1017 (citing *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990), as well as *Associated Indus. v. Lohman*, 511 U.S. 641, 114 S.Ct. 1815, 128 L.Ed.2d 639 (1994), and *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 755, 115 S.Ct. 1745, 1750, 131 L.Ed.2d 820 (1995)). However on closer inspection of this "more recent" authority it is apparent the United States Supreme Court has not turned its back on the Fathers but merely recognizes, under constitutionally limited circumstances, (1) a legislature may retroactively amend an otherwise unconstitutional statute so as to restore its validity during the effective period of the retroactive amendment; or (2) a decision declaring a new rule of law need not be retroactively applied.[8]

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[8] The majority's concern is properly evaluated under the Supreme Court's retroactivity analysis—a concern which is satisfied when the case is held, as it was here, to have retroactive effect. But the majority goes further, appearing to conclude that the

This then leads us to the next inquiry, i.e., does the 1987 act in fact retroactively amend preexisting law? For if it does not, we need not consider any possible constitutional objection to a retroactive scenario not presented. I venture this inquiry is summarily answered in the negative by the statute's text.

II. Section 3 of 1987 amendment is a prospective attempt to limit preexisting remedies and does not retroactively cure the constitutional text

The majority, as well as previous decisions from this court, unfortunately use the term "retroactive" in relation to the 1987 act rather loosely by failing to distinguish between retroactive amendments to the substance of the

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principle that an unconstitutional law is void has been, sub silentio, overturned by the Supreme Court in *Lemon v. Kurtzman*, 411 U.S. 192, 197-99, 93 S.Ct. 1463, 1468-69, 36 L.Ed.2d 151 (1973). Majority at 1017 n. 10. But Lemon stands for something quite different. As the Supreme Court explained, courts must recognize that statutes and judge-made rules of law are facts upon which people rely when making decisions. *Lemon*, 411 U.S. at 198-99, 93 S.Ct. 1463. Therefore a judicial holding that a statute is unconstitutional is subject to " 'no set "principle of absolute retroactive invalidity" . . . .' " *Id.* (quoting *Linkletter v. Walker*, 381 U.S. 618, 627, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965)). Rather, the court must reconcile the constitutional interests and reliance interests when determining whether the rule of the case shall be retroactively applied to fashion an appropriate equitable remedy. *Lemon*, 411 U.S. at 198-99, 93 S.Ct. 1463. We completed this process when we finally determined in 1996 that the Supreme Court's decision in *Tyler Pipe* nullifying our previous B & O tax would be applied retroactively. *Digital Equip. Corp.*, 129 Wash.2d at 188, 916 P.2d 933 (Smith, J., majority opinion); *id.* at 195, 916 P.2d 933 (Durham, C.J., concurring). As we have already determined that the Supreme Court's decision in *Tyler Pipe* applies retroactively, *Lemon's* concerns have been satisfied and do not support the majority's conclusion that one deprived of his constitutional rights may also be robbed not only of his remedy but also his defense to future deprivations.

tax vis-a-vis backward looking limitations on available remedies for prior tax periods.[9] On its face the 1987 act states its effective date shall be August 11, 1987.[10] Were the statute retroactive it would necessarily identify some prior effective date.[11] However here the legislature not

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[9] "We have already decided this issue [retroactive application of tax credit amendments] as well." Majority at 1021. "Section 3 of the [1987 act] shows that the Legislature intended to apply relief retroactively in the event of a court-ordered remedy notwithstanding the effective date of the act." *American Nat'l Can Corp. v. Department of Revenue*, 114 Wash.2d 236, 250, 787 P.2d 545 (1990) (emphasis added). "[S]ection 3 of the 1987 session laws applies the law to tax periods prior to June 23, 1987." *Digital Equip. Corp.*, 129 Wash.2d at 193, 916 P.2d 933.

[10] Sec. 5. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

Passed the Senate August 10, 1987.
Passed the House August 10, 1987.
Approved by the Governor August 11, 1987.
Filed in Office of Secretary of State August 11, 1987.
Laws of 1987, 2d Ex.Sess., ch. 3, § 5.

[11] Where the legislature has clearly stated that the statute in question is to be applied retroactively, courts will so enforce it. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 268, 114 S.Ct. 1483, 1498, 128 L.Ed.2d 229 (1994); *State v. Douty*, 92 Wash.2d 930, 935, 603 P.2d 373 (1979). The United States Supreme Court has, for example, upheld the retroactive effective date of tax legislation where the legislative command has been explicit. *See, e.g., United States v. Carlton*, 512 U.S. 26, 38-39, 114 S.Ct. 2018, 2026, 129 L.Ed.2d 22 (1994); *United States v. Darusmont*, 449 U.S. 292, 294-95, 101 S.Ct. 549, 551, 66 L.Ed.2d 513 (1981) (per curiam); *Welch v. Henry*, 305 U.S. 134, 141-42, 151, 59 S.Ct. 121, 123, 83 L.Ed. 87, 118 A.L.R. 1142 (1938). Typically retroactive statutes expressly identify the prior effective date. For example, the statute at issue in *Carlton* stated that the amendments "shall take effect as if included in the amendments made by section 1172 of the Tax Reform Act of 1986." Omnibus Budget Reconciliation Act of 1987, Pub.L. No. 100-203, § 10411(b), 101 Stat. 1330-433. The statute under consideration in *Darusmont* read "the amendments made by this section shall apply to items of tax preference

only failed to do that, but affirmatively did exactly the opposite. Had the statute not identified its effective date as August 11, 1987 a judicial question might have been presented as to its effective date by default; however, even in that event the statute would have been judicially deemed prospective in accordance with overwhelming authority.[12]

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for taxable years beginning after December 31, 1975." Tax Reform Act of 1976, Pub.L. No. 94-455, § 301(g)(1), 90 Stat. 1553. In *Welch* the state statute at issue read, " 'Dividends' shall mean all dividends derived from stocks . . . received in the calendar year 1933. . . ." 1935 Wis. Laws ch. 15, § 6(1)(b).

Our legislature showed its understanding of this rule when it last amended the B & O tax. "Except as otherwise provided in section 6 of this act, section 4 of this act applies retrospectively to all tax reporting periods on or after June 23, 1987." Laws of 1994, ch. 124, § 7 (emphasis added).

Section 6 of the Laws of 1994, chapter 124, is, in fact, the very language we are considering. Laws of 1994, ch. 124, § 6. Section 4 is the substantive change to the B & O tax. Laws of 1994, ch. 124, § 4. That is, in 1994, the Legislature explicitly made the 1987 amendments to the B & O tax retroactive to June 23, 1987, the date on which the Supreme Court invalidated Washington's previous B & O tax, and no earlier.

[12] Absent an explicit command otherwise, a court will apply a statute prospectively only. *Landgraf*, 511 U.S. at 270, 114 S.Ct. 1483 ("Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent.") (citations omitted); *State v. Douty*, 92 Wash.2d 930, 935, 603 P.2d 373 (1979) ("It is a general rule . . . that a statute will be construed as prospective unless its language requires a contrary construction.").

This rule reflects the fact that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf*, 511 U.S. at 265, 114 S.Ct. 1483. While retroactive legislation is not unconstitutional per se, the presumption that it is finds manifestation in several federal constitutional provisions, such as the Ex Post Facto Clause, Const. art. I, § 9, cl. 3, and art. I, § 10, cl. 1, and the prohibition on laws impairing contracts, art. I, § 10, cl. 1. *See Landgraf*, 511 U.S. at 266, 114 S.Ct. 1483. The antipathy

This conclusion does not change by virtue of section 3 of the 1987 act, which in essence purports to limit judicial remedies to tax credits for prior tax periods; for this section is not on its face an expression of retroactivity but rather a prospective attempt to limit future remedies for prior events. Such does not make the statute "retroactive." *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 273, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) ("When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive."). Therefore we must, at the outset, distinguish all claims of the majority which are premised upon retroactive tax statutes,[13] as this one isn't. Indeed

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to retroactive legislation is further reflected in the Fifth Amendment's prohibition on takings and the prohibitions on Bills of Attainder found in art. I, §§ 9-10. *See Landgraf*, 511 U.S. at 266, 114 S.Ct. 1483. *See also* 2 Joseph Story, Commentaries on the Constitution of the United States § 1398, at 272 (5th ed. 1891) (While except for ex post facto laws and laws impairing obligation of contracts retroactive statutes may still be passed by the states, they are nonetheless "generally unjust[ ] and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact.") (citation omitted); 1 James Kent, Commentaries on American Law, 454 (5th ed. 1844) (Retroactive laws are against every sound principle and the doctrine prohibiting them is based not only on English law but on "principles of general jurisprudence.") (citations omitted).

[13] In this regard the majority cites *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990) for the proposition that "the United States Supreme Court recognized where a State imposes an unconstitutional tax . . . the state legislature may modify the offending statute retroactively to correct the constitutional defect." Majority at 1017. Although the Supreme Court recognized the possibility in *McKesson* ("Florida may reformulate and enforce the Liquor Tax during the contested tax period. . . ." 496 U.S. at 40, 110 S.Ct. 2238), there was no retroactive legislation for the court to consider in *McKesson*. Neither is there any case analogous to our own, evidencing a legislative or judicial attempt to limit the remedy for prior tax periods, which has found favor in Supreme

it seems nearly the entire majority opinion builds upon this false premise.[14]

III. Section 3 of the amendatory act is an unconstitutional "bait and switch" tactic which offends due process

Interstate taxpayers subject to B & O taxation before the effective date of the 1987 act, August 11, 1987, also challenge the constitutionality of section 3's legislative attempt to restrict the availability of their preexisting statutory right to either defend against collection of unconstitutional taxes or obtain a full cash refund of such taxes if already paid. Section 3 of the 1987 act is uncodified. It speaks to legislative "intent" yet does not purport to amend much less repeal preexisting statutes of general application which then, and now, provide clear and certain relief from unconstitutional taxation. See notes two, three, and four, *supra*.

These taxpayers object to any effort to limit their remedy to tax credits, asserting such limitation not only deprives the taxpayer of that "clear and certain remedy" which the constitution requires for coerced payment of unconstitutional taxes, *McKesson*, 496 U.S. at 32, 110 S.Ct. 2238, but also engages in unconstitutional "bait and switch" tactics depriving the taxpayer of a clearly established preexisting state remedy.

Court jurisprudence. See section III, *infra*. Moreover, the Supreme Court cautioned that even truly retroactive impositions of tax liability "beyond some temporal point" may offend due process. *McKesson*, 496 U.S. at 40 n. 23, 110 S.Ct. 2238.

[14] The majority's entire analysis on the application of the 1987 MATC, Majority at 1019-1022, is predicated on the presumption that the 1987 act has been given retroactive effect at all times prior to its passage.

The essential constitutional flaw that lies at the heart of any attempt to retrospectively limit a taxpayer's remedy (to tax credits, for example) has been succinctly set out by the Supreme Court:

> In a long line of cases, this Court has established that due process requires a "clear and certain" remedy for taxes collected in violation of federal law. A State has the flexibility to provide that remedy before the disputed taxes are paid (predeprivation), after they are paid (postdeprivation), or both. But what it may not do . . . is hold out what plainly appears to be a "clear and certain" postdeprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists.

Reich v. Collins, 513 U.S. 106, 108, 115 S.Ct. 547, 130 L.Ed.2d 454 (1994) (citations omitted). Although we held limitation of the postdeprivation remedy to tax credits satisfies due process in *Digital Equipment* (*Digital Equip. Corp. v. Department of Revenue,* 129 Wash.2d 177, 916 P.2d 933, *cert. denied,* 520 U.S. 1273, 117 S.Ct. 2452, 138 L.Ed.2d 210 (1997)) and *Digital Equipment* postdated *Reich, Digital Equipment* did not consider the "bait and switch" objection outlined in *Reich,* nor even cite *Reich* to signal awareness of the contrary precedent.

Notwithstanding this contrary Supreme Court mandate the majority now blesses not only that which the Supreme Court has expressly condemned but what our court has condemned as well. In *National Can Corp. v. Department of Revenue,* 109 Wash.2d 878, 749 P.2d 1286 (1988) (*National Can II*) we held: "If the taxes were collected in violation of the constitution, then the state refund statutes would mandate refunds," refusing the refund only on the mistaken assumption *Tyler Pipe* was not

to be applied retroactively. *National Can II*, 109 Wash. 2d at 880-81, 749 P.2d 1286. Yet now the majority acknowledges *Tyler Pipe* applies retroactively (as we also held in *Digital Equip.*, 129 Wash.2d at 188, 916 P.2d 933) yet ignores, without overruling, our previous holding that retroactive application of *Tyler Pipe* "mandate[s] refunds." *National Can II*, 109 Wash.2d at 881, 749 P.2d 1286. Consistency, therefore, is found only in the result which favors the tax collector, not the reasons which justify it.[15]

This case falls within the constitutional "bait and switch" prohibition because at all times material hereto every Washington taxpayer has enjoyed, and even now does enjoy, the statutory right to (1) simply lawfully refuse to pay an unconstitutional tax in the first place, RCW 82.04.4286; (2) seek an injunction against paying an unconstitutional tax, RCW 51.52.113; or (3) pay now and claim a refund later, RCW 82.32.060. Section 3's limitation of remedy is after the fact; it overlays these preexisting remedial statutes and clearly offends the "bait and switch" doctrine set forth in *Reich* and its progeny.

In *Reich* the Supreme Court considered a Georgia statute which, like RCW 82.32.060, provided a right to refund of taxes illegally paid, whether voluntary or not. *Reich*, 513 U.S. at 108-09, 115 S.Ct. 547 (citing Ga. Code Ann. § 48-2-35(a) (Supp. 1994)). But Georgia courts attempted to defeat the preexisting remedy by claiming it did not apply to taxes collected pursuant to an unconstitutional statute. The Georgia Supreme Court

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15 See Sheldon H. Jaffe, What a Long Strange Trip It's Been: Court-Created Limitations on Rights of Action for Negligently Furnishing Alcohol, 72 Wash. L.Rev. 595, 608 (1997) (conflicting holdings are entitled to less precedential authority as they do not live up to principle of predictability that is at core of doctrine of stare decisis).

therefore denied the statutory refund remedy, claiming due process was satisfied by an unutilized predeprivation process.

The Supreme Court acknowledged states have flexibility with respect to whether they will maintain an exclusively predeprivation remedial scheme, or an exclusively postdeprivation remedial scheme, or a hybrid regime, yet cautioned:

> But what a State may not do, and what Georgia did here, is to reconfigure its scheme, unfairly, in midcourse—to "bait and switch," as some have described it. Specifically, in the mid-1980's, Georgia held out what plainly appeared to be a "clear and certain" postdeprivation remedy, in the form of its tax refund statute, and then declared, only after Reich and others had paid the disputed taxes, that no such remedy exists.

Reich, 513 U.S. at 111, 115 S.Ct. 547. Washington holds out exactly such a clear and certain remedy for the payment of an unconstitutional tax—a refund, RCW 82.32.060—but the majority now seeks to deny the right of these taxpayers to exercise that statutory remedy.

Newsweek, Inc. v. Department of Revenue, 522 U.S. 442, 118 S.Ct. 904, 905, 139 L.Ed.2d 888 (1998) (per curiam) adds force to *Reich.* There considered was suit brought by Newsweek magazine against the Florida Department of Revenue seeking refund of sales taxes collected from Newsweek magazine between 1988 and 1990, contrary to the First Amendment of the United States Constitution. Newsweek claimed Florida's denial of the refund, notwithstanding a preexisting Florida refund statute analogous to Washington's, violated its due process right to relief as defined by *McKesson v. Division of Alcoholic Beverages & Tobacco,* 496 U.S. 18, 110 S.Ct.

2238, 110 L.Ed.2d 17 (1990). The Florida trial court dismissed Newsweek's claim attempting to distinguish *McKesson's* requirement for "meaningful backward-looking relief" based upon Florida law. *Newsweek, Inc.*, 522 U.S. 442, 118 S.Ct. at 904 (citing *McKesson*, 496 U.S. at 31, 110 S.Ct. 2238). However, the Supreme Court summarily reversed based upon *McKesson* and *Reich*, holding that where state law holds out either a pre- or post-payment remedy during the tax period in question, due process requires the state to continue to offer the remedy and prevents the state from withdrawing that remedy after the fact which was available during the prior taxable period:

> While Florida may be free to require taxpayers to litigate first and pay later, due process prevents it from applying this requirement to taxpayers, like Newsweek, who reasonably relied on the apparent availability of a postpayment refund when paying the tax.
>
> Newsweek is entitled to a clear and certain remedy and thus it can use the refund procedures to adjudicate the merits of its claim. *Newsweek, Inc.*, 522 U.S. 442, 118 S.Ct. at 905.

But our majority rejects the "bait and switch" argument, asserting the Supreme Court has "specifically approved the credit remedy set forth in the 1987 remedial legislation." Majority at 1020 (emphasis in the original) (citing *Tyler Pipe*, 483 U.S. at 249, 107 S.Ct. 2810). The majority's claim is fanciful since the Supreme Court in June of 1987 certainly had no occasion to "specifically approve" legislation passed nearly two months later! To the contrary, referenced dicta in *Tyler Pipe* deals not with a retroactive credit in lieu of preexisting statutory remedies but with prospective credits which might prospectively cure the commerce clause deficiency. *Accord*

General Motors Corp. v. City & County of San Francisco, 69 Cal. App. 4th 448, 81 Cal. Rptr.2d 544, 549 (1999). This dicta is irrelevant on its face to the statutory right of a taxpayer to a refund of an unconstitutional tax actually paid, much less the obvious validity of a defense against paying an unconstitutional tax in the first place.[16]

The majority reasons—despite the fact taxpayers had every reason to believe that they would be entitled to a refund or defense, as that is what our statutes promised them—the taxpayers have not been the victims of duplicity because they still have the right to "challenge" Washington's B & O tax scheme in court. Majority at 1020. But what good is a challenge absent a remedy? Chief Justice John Marshall proclaimed in *Marbury*, "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury" and "One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. 137, 163, 1 Cranch 137, 2 L.Ed. 60 (1803). Following up this observation the Chief Justice relied upon Lord Blackstone for the proposition "every right, when withheld, must have a remedy, and every injury its proper redress"; and then drew the circle to its close in language so plain even today's majority cannot hide from its mandate:

> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve the high ap-

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[16] "Either a repeal of the manufacturing tax or an expansion of the multiple activities exemption to provide out-of-state manufacturers with a credit for manufacturing taxes paid to other States would presumably cure the discrimination." *Tyler Pipe*, 483 U.S. at 249, 107 S.Ct. 2810. *See also National Can II*, 109 Wash.2d at 889, 749 P.2d 1286 (describing tax credit suggestion by United States Supreme Court as "dicta").

> pellation, if the laws furnish no remedy for the violation of a vested right. *Marbury*, 5 U.S. at 163.[17]

The majority's sophistry was most recently, and pointedly, rejected by the Supreme Court in *Reich*:

> [T]he Georgia Supreme Court's reliance on Georgia's predeprivation procedures was entirely beside the point (and thus error), because even assuming the constitutional adequacy of these procedures—an issue on which we express no view—no reasonable taxpayer would have thought that they represented, in light of the apparent applicability of the refund statute, the exclusive remedy for unlawful taxes.

Reich, 513 U.S. at 111, 115 S.Ct. 547. *Accord Newsweek, Inc.*, 522 U.S. 442, 118 S.Ct. at 905. Surely, there is simply no reason taxpayers prior to enactment of the 1987 act would have thought that credit procedures which did not even then exist barred plain statutory remedies against collection of unconstitutional taxes![18]

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[17] *See also* Holt, C.J., in *Ashby v. White*, 2 Ld. Raym. 938, 92 Eng. Rep. 126 (1703) ("it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal"); and *see Willcox v. Penn Mut. Life Ins. Co.*, 357 Pa. 581, 600, 55 A.2d 521, 530-31, 174 A.L.R. 220 (1947) ("Not only is the maxim "ubi jus ibi remedium—where there is a right there is a remedy—one of the proudest declarations of the common law, but it necessarily implies that a right without a remedy is not a right at all but a mere abstraction.").

[18] It is true that we upheld tax credits as an excuse for post-deprivation relief subsequent to Reich. *Digital Equip. Corp.*, 129 Wash.2d at 194-95, 916 P.2d 933. However, we did so without considering the implications of the Supreme Court's disapproval of an analogous "bait and switch" approach.

IV. The 1987 tax credit scheme itself unconstitutionally discriminates against interstate commerce

Ever mindful that "the power to tax is the power to destroy," we must be even more solicitous of the ratifiers' intent that interstate commerce be spared those burdens imposed by discriminatory state and local taxation.[19] "The Supreme Court has traditionally recognized that a large part of the rationale for granting Congress control over interstate commerce 'was to [e]nsure . . . against discriminating State legislation.' " Laurence H. Tribe, American Constitutional Law 453 (2d ed. 1988) (citing *Welton v. Missouri*, 91 U.S. (1 Otto) 275, 280, 23 L.Ed. 347 (1875)).

"A State may not 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.' " *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 197, 115 S.Ct. 1331, 1344, 131 L.Ed.2d 261 (1995) (*quoting Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458, 79 S.Ct. 357, 3 L.Ed.2d 421, 67 A.L.R.2d 1292 (1959)).

But this credit scheme discriminates against interstate commerce in both form and substance. First, section 3, as the majority construes it, requires interstate taxpayers seeking a remedy for prior unconstitutional taxation to prove, through a difficult, burdensome, if not impossible, procedure the quantum of foreign taxes actually paid as well as the technical intricacies of foreign taxation to qualify for a credit; whereas in-state businesses are automatically credited the entire amount in the first instance. Second, it is a discriminatory scheme in itself which places the burden on the taxpayer to prove and quantify the

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[19] *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431, 4 L.Ed. 579 (1819); cf. Tribe, *supra*, at 404, 444.

specific taxes actually paid to other taxing jurisdictions to obtain the unlikely credit.

A. Tax credits are discriminatorily more burdensome for interstate taxpayers to obtain than in-state taxpayers

As illustrated by the record in this very proceeding, the discriminatory nature of the tax credit scheme is borne out by the practical nonavailability of such credits to interstate business. In order for the interstate taxpayer to avail himself of the credit, it is necessary to produce voluminous factual documentation [20] from every other tax-

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[20] "The business activity subject to tax, and against which credit(s) is claimed, must involve the same ingredients or product upon which the tax giving rise to the credit(s) was paid. The credits must be product-specific." WAC 458-20-19301(4)(d). WAC 458-20-19301(9) provides:

"Recordkeeping requirements. Persons claiming the MATC must keep and preserve such records and documents as may be necessary to prove their entitlement to any credits taken under this system (RCW 82.32.070). It is not required to submit copies of such proofs when credits are claimed or together with the Schedule C detail. Rather, such records must be kept for a period no less than five years from the date of the tax return upon which the related tax credits are claimed. Such records are fully subject to audit for confirmation of the validity and amounts of credits taken. Records which must be preserved by persons claiming external tax credits include:

"(a) Copies of sales contracts, or other written or memorialized evidence of any sales agreements, including purchase and billing invoices showing the origin state and destination state of products sold.

"(b) Copies of shipping or other delivery documents identifying the products sold and delivered, reconcilable with the selling documents of subsection (a) above, if appropriate.

"(c) Copies of production reports, transfer orders, and similar such documents which will reflect the intercompany or in-

ing jurisdiction in America for periods increasingly remote in time, without end. As a practical matter, such record-keeping is extremely difficult, even if the necessity for the records is known in advance, and nearly impossible if the requirement is imposed, as it is here, after the fact. *See General Motors Corp.*, 81 Cal. Rptr. 2d at 548.

This record demonstrates, for example, that such specific documentation may not have been maintained in the first instance in other taxing jurisdictions, or may have been lost or destroyed over the intervening years even if it had.[21] However the failure to originally make, or there-

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terdepartmental movement of extracted ingredients or manufactured products where no sale has occurred.

"(d) Copies of tax returns or reports filed with other states' taxing authorities showing the kinds and amounts of taxes paid to such other states for which MATC is claimed.

"(e) Copies of canceled checks or other proofs of actual tax payment to the other state(s) giving rise to the MATC claimed.

"(f) Copies of any other state(s) taxing statutes, laws, ordinances, and other appropriate legal authorities necessary to establish the nature of the other states' tax as a gross receipts tax, as defined in this section.

"(g) Failure to keep and preserve proofs of entitlement to the MATC will result in the denial of credits claimed and the assessment of all taxes offset or reduced by such credits as well as the additional assessment of interest and penalties as required by law. (See RCW 82.32.050.)."

[21] W.R. Grace's manager of state and local taxes explained that Grace had not kept the extensive records mandated by the WAC because it was not required to do so prior to the effective date of the 1987 act and the WAC regulations applicable to it. Clerk's Papers (CP) (Grace) at 924-25. In the same manner Chrysler, according to its Chief Tax Counsel John L. Loffredo, also failed to keep these records as they were under no obligation to do so. CP (Chrysler) at 541-42. As an example of the injustice perpetrated by our application of the WAC regulations, consider the case of W.R. Grace which has "sold at least five of the divisions against which Washington tax has been assessed, does not have their records, and does not have the employees who are knowl-

after maintain, these records is fatal to any claim of the interstate taxpayer for a tax credit whereas an in-state taxpayer has an automatic credit. Thus, as a practical matter, the in-state taxpayer enjoys an automatic 100 percent credit whereas the interstate taxpayer is lucky to recoup 1 percent, if that.[22]

The discriminatory burden placed upon interstate taxpayers to obtain the benefits of a tax credit in excess of that burden placed upon in-state taxpayers is so readily apparent that the lesson is clear to anyone engaged in interstate business that the business is much better off to move in-state so as to claim a B & O credit to both manufacture and sell in-state rather than risk a doubtful and difficult-to-prove credit for performing one of those functions out-of-state. This record demonstrates the cumbersome, if not impossible, procedure to recoup taxes paid in other jurisdictions to offset duplicitous taxes paid by the interstate business under the discriminatory Washington B & O tax falls much more heavily on the shoulders of interstate businesses than on their in-state counterparts.

But even if the taxpayer could carry his burden to prove double taxation in fact, simply placing such a burden on his shoulders itself unconstitutionally discriminates against his commerce.

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edgeable about their activities during the period 1980 through 1989." CP (Grace) at 925.

22 For example, according to the Department of Revenue the total external (i.e., interstate) credits for 1988-1989 were $1 million. CP (Grace) at 163. Yet, state estimates showed a total wholesale B & O tax to be paid by out-of-state manufacturers in the 1987-1989 biennium of $150 million. CP (Grace) at 303. Department of Revenue figures show total external credits for 1988 through 1993 of $5.7 million vs. internal credits of $670.30 million. CP (Grace) at 176.

B. Interstate taxpayers may not be constitutionally required to prove "specific interstate transactions were subjected to multiple taxation in order to advance claim of discrimination" [23]

There is also the prospect, if not likelihood, that actual taxes paid on business activity in other jurisdictions will not be specifically analogous to the technical intricacies of the Washington B & O tax, thus disqualifying the interstate taxpayer from claiming foreign taxes actually paid as a credit against a Washington tax bill. This is not because interstate businesses do not pay business taxes in other jurisdictions, but because those tax schemes differ in technical aspects from our own. This discriminatory feature cannot be constitutionally cured even in theory by putting the taxpayer to his proof of actual taxes paid in other jurisdictions; however, even if it could, the burden of this proof, in and of itself, discriminatorily falls on the commerce of the interstate taxpayer. *See General Motors Corp.*, 81 Cal. Rptr. 2d at 547-48.

While the in-state taxpayer has an automatic credit, the interstate taxpayer must not only prove that he actually paid business taxes in another jurisdiction but must also prove the exact analogy of the foreign tax law to our own in order to qualify. This was exactly the burden the state tax collector sought to be placed on the interstate taxpayer to prove his claim in *Tyler Pipe* that the statute was unconstitutional. But that argument was squarely rejected by the Supreme Court in no uncertain terms:

> The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs,

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[23] *Tyler Pipe*, 483 U.S. at 242, 107 S.Ct. 2810.

on the shifting incidence of the varying tax laws of the various States at a particular moment.

Tyler Pipe, 483 U.S. at 242 n. 11, 107 S.Ct. 2810 (*quoting Freeman v. Hewit*, 329 U.S. 249, 256, 67 S.Ct. 274, 91 L.Ed. 265 (1946)); *see also City of Winchester v. American Woodmark Corp.*, 252 Va. 98, 471 S.E.2d 495 (1996). However the tax credit scheme at issue here incorporates on its face exactly that discriminatory mechanism which the Supreme Court condemned in the very opinion which struck down the unconstitutional tax which this credit scheme was supposedly enacted to cure: it leaves interstate taxpayers to "the shifting incidence of the varying tax laws of the various states at a particular moment." In pegboard fashion, the vice is suppressed here, only to reappear there: the Supreme Court disclaims any burden on the taxpayer to show how he has been harmed in fact to prove the tax unconstitutional, yet now the state reimposes the same burden by conditioning relief on precisely that.

V. The commerce clause requires apportionment of gross receipt taxes on interstate business

The final concern is the constitutionality of the gross receipts tax, amended or not, vis-a-vis the claim that it constitutionally must be apportioned, but is not.

Consistent with the jurisdictional requirements of the due process and commerce clauses, a state may levy a nondiscriminatory tax on an aspect of a multi-state transaction otherwise wholly immune from taxation because interstate in character (such as gross receipts from an out-of-state sale made by a local corporation), if the method by which the tax is measured apportions the tax burden in conformity with a formula that rationally relates the amount of the tax to the fraction of interstate

activity taking place within the taxing state. Because they seek to derive uniquely local bases for state taxation from otherwise interstate aspects of taxed transactions, apportionment formulas in theory prevent interstate commerce from being cumulatively burdened by repeated taxation of the same incident.[24]

Althoough we have previously approved the tax at issue here against claims of malapportionment in *National Can Corp. v. Department of Revenue*, 105 Wash.2d 327, 340-42, 732 P.2d 134 (1986), *judgment vacated* by *Tyler Pipe*, 483 U.S. 232, 107 S.Ct. 2810, (*National Can I*), and *American Nat'l Can Corp. v. Department of Revenue*, 114 Wash.2d 236, 239, 787 P.2d 545 (1990), such approval was in the context of a challenge that conceded the tax met the Supreme Court's apportionment requirement. *Id.* at 241, 787 P.2d 545. Moreover, that holding is ultimately not in accordance with the requirements of the commerce clause viewed from a perspective more enlightened by recent Supreme Court precedent and the more vigorous advocacy of these parties than was the case in presentations leading to previous decisions.[25] We

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[24] Tribe, *supra*, at 465 (footnote omitted); *see also Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed.2d 421, 67 A.L.R.2d 1292 (1959)

[25] Since *American Nat'l Can*, we have, in passing, mentioned that the B & O tax as amended in 1987 "meets constitutional requirements." *Digital Equip. Corp.*, 129 Wash.2d at 182 n. 8, 916 P.2d 933. However, we made that statement in reliance solely upon *American Nat'l Can*, 114 Wash.2d 236, 787 P.2d 545, a case where the taxpayer had conceded that the tax was fairly apportioned. *Id.* at 248, 787 P.2d 545. The taxpayer in *Digital* also conceded that it was not necessarily entitled to a refund. *Digital Equip. Corp.*, 129 Wash.2d at 189, 916 P.2d 933. Finally, the *Digital* court expressed its opinion on the constitutionality of Washington's B & O tax although that was not an issue before it. *Id.* at 182 n. 8, 916 P.2d 933. In fact we commented, "[o]ur consideration of the principal issues in this case became acutely academic when counsel for

have recognized as fundamental our state commerce clause jurisprudence must yield to Supreme Court precedent rather than repeating our own errors. *See Digital Equip. Corp.*, 129 Wash.2d 177, 916 P.2d 933. *See also Tricon, Inc. v. King County*, 60 Wash.2d 392, 394, 374 P.2d 174 (1962) ("The issue here involves the interpretation and application of the federal constitution and we are bound to follow the decisions of the Supreme Court of the United States, which have passed on this issue."); *B.F. Goodrich Co. v. State*, 38 Wash.2d 663, 676, 231 P.2d 325 (1951) ("It scarcely needs be said that, with respect to matters involving the Federal constitution, we, as an inferior tribunal, must follow the pronouncements of [the United States Supreme Court] no matter what our private views may be.").

Every state tax must pass a four-part test to comply with the dormant commerce clause. *American Nat'l Can*, 114 Wash.2d at 241, 787 P.2d 545 (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977)). To comply, state taxation of interstate business must: (1) tax only interstate activities with a sufficient connection to the taxing state; (2) be fairly apportioned to the taxpayer's activities in the taxing state; (3) not discriminate against interstate commerce; and (4) be fairly related to the services provided by the state. *Id.*[26] The taxpayers in *American Nat'l Can* only

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Digital during oral argument conceded that Digital had not been 'double taxed' and consequently suffered no injury under the former unconstitutional tax scheme." *Id.* at 192, 916 P.2d 933. Resulting dicta on apportionment is therefore not precedential. *See, e.g., Peterson v. Hagan*, 56 Wash.2d 48, 53, 351 P.2d 127 (1960) (noting general expressions in opinion confined to facts before court and limited to case decided and points actually involved).

[26] "Lying back of these decisions is the recognized danger that, to the extent that the burden falls on economic interests without the state, it is not likely to be alleviated by those political re-

raised a third prong discrimination challenge, *id.*, but in point of law the Washington scheme of tax credits still does not solve the fair apportionment prong.

Central Greyhound Lines v. Mealey, 334 U.S. 653, 68 S.Ct. 1260, 92 L.Ed. 1633 (1948) controls.[27] It holds fair apportionment of gross receipt taxes is required to pass muster under the dormant commerce clause. The gross receipt tax there considered was nearly identical to that imposed here. New York taxed gross receipts of an interstate bus line traveling between points within the state, but over routes which utilized highways outside the state in Pennsylvania and New Jersey. The gross receipts of these bus tickets were taxed without apportionment (or limitation) to in-state activities.

The United States Supreme Court held these unapportioned gross receipts taxes violated the commerce clause because they were not apportioned to taxing only in-state segments of travel.

The unapportioned New York tax is indistinguishable from Washington's except for Washington's tax credit feature. However it is apparent from *Central Greyhound Lines* that allowance of a tax credit is no defense to a fair apportionment challenge as the Supreme Court there held the tax must be apportioned even if no out-of-state taxes are paid or credited against the domestic tax:

> [E]ven if neither Pennsylvania nor New Jersey sought to tax their proportionate share of the revenue from this transportation, such abstention would

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straints which are normally exerted on legislation where it affects adversely interests within the state." *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 45-46 n. 2, 60 S.Ct. 388, 84 L.Ed. 565, 128 A.L.R. 876 (1940).

[27] Cf Tribe, *supra*, at 441-42.

not justify the taxing by New York of the entire revenue.

Central Greyhound Lines, 334 U.S. at 663, 68 S.Ct. 1260 (*citing Freeman v. Hewit*, 329 U.S. 249, 256, 67 S.Ct. 274, 288, 91 L.Ed. 265 (1946)). By its very nature "an unapportioned gross receipts tax makes interstate transportation bear more than 'a fair share of the cost of the local government whose protection it enjoys.'" *Central Greyhound Lines*, 334 U.S. at 663, 68 S.Ct. 1260 (*quoting Freeman*, 329 U.S. at 253, 67 S.Ct. 274). The vice is that "it lays 'a direct burden upon every transaction in [interstate] commerce by withholding, for the use of the State, a part of every dollar received in such transactions.'" *Central Greyhound Lines*, 334 U.S. at 663, 68 S.Ct. 1260 (alterations in original) (quoting *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292, 38 S.Ct. 126, 62 L.Ed. 295 (1917)).

Although *Tyler Pipe* seems to discount an apportionment challenge to Washington's gross receipts tax,[28] more

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[28] The Supreme Court declined to discuss the apportionment challenge mounted by local manufacturers who sell interstate, *Tyler*, 483 U.S. at 248 n. 16, 107 S.Ct. 2810; however, it noted "the activity of wholesaling—whether by an in-state or an out-of-state manufacturer—must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax." *Tyler Pipe*, 483 U.S. at 251, 107 S.Ct. 2810 (*citing Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 280-81, 98 S.Ct. 2340, 57 L.Ed.2d 197 (1978) and *Standard Pressed Steel Co. v. State Dep't of Revenue*, 419 U.S. 560, 564, 95 S.Ct. 706, 42 L.Ed.2d 719 (1975)). This wholly intrastate analysis is what makes sales and use taxes acceptable under the dormant commerce clause. *See Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 188-90, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995). If, however, the activity taxed is not truly exclusively intrastate, then the tax must be apportioned. *Id.* Tribe also discounts the apportionment discussion in *Tyler Pipe*, observing that the court then "had no occasion to question [*General Motors Corp. v. Washington*, 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 430 (1964), overruled by *Tyler Pipe Ind., Inc. v. Depart-*

recent Supreme Court authority has reinvigorated the vitality of *Central Greyhound*'s gross receipt tax apportionment requirement, highlighting the critical distinction between gross receipts and sales tax, not their analogy.

As the Supreme Court explained, the apportionment prong of the *Complete Auto Transit* test is required to ensure a state taxes only its fair share of an interstate transaction. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 184, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995) (*quoting Goldberg v. Sweet*, 488 U.S. 252, 260-61, 109 S.Ct. 582, 102 L.Ed.2d 607 (1989)). The question is how to slice up the tax pie among the states in which the taxpayer's activities have contributed to taxable value. *Oklahoma Tax Comm'n*, 514 U.S. at 186, 115 S.Ct. 1331. The answer is to apportion the income among the states in which the activity has occurred, and allow taxation only of that portion attributable to activity within that state. *Id.*

Sales taxes do not fit within this formula and thus need not be apportioned because, the Supreme Court reasoned, a sale of goods is best viewed "as a discrete event facilitated by the laws and amenities of the place of sale, and the transaction itself does not readily reveal the extent to which completed or anticipated interstate activity af-

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ment of Revenue, 483 U.S. 232, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987)] . . . conclusions with respect to nexus and fair apportionment. *Id.* at 2820 n. 16, 107 S.Ct. 2810." Tribe, *supra*, at 464 n. 21.

The two cases cited by the Supreme Court in *Tyler Pipe* during its discussion of apportionment provide some enlightenment. *Standard Pressed Steel* states that the taxpayer challenging the lack of apportionment of a B & O tax, as applied, must show risk of multiple taxation. *Standard Pressed Steel*, 419 U.S. at 563-64, 95 S.Ct. 706. But here the risk of multiple taxation is amply demonstrated. *See supra* section IV. *Moorman*, in turn, merely notes that the holding in *Standard Pressed Steel* found that a tax on the entire gross receipts from sales made in Washington were properly apportioned. *Moorman*, 437 U.S. at 280-81, 98 S.Ct. 2340.

fects the value on which a buyer is taxed." *Oklahoma Tax Comm'n*, 514 U.S. at 186, 115 S.Ct. 1331. What saves a sales tax from apportionment challenge is that it does not provide an opportunity for multiple taxation of the same activity, as the tax necessarily falls only once upon the buyer or the goods or services who is taxed on his purchase at a single location. *Id.* at 189-90, 115 S.Ct. 1331. However a tax upon gross receipts does require apportionment because multiple taxation is possible, as the origin of the taxable value may be extraterritorial. *Id.* (*citing Central Greyhound Lines*, 334 U.S. 653, 68 S.Ct. 1260).

Jefferson Lines thus represented a critical clarification of previous Supreme Court precedent on this issue. See Walter Hellerstein et al., Commerce Clause Restraints on State Taxation after Jefferson Lines, 51 Tax L. Rev. 47, 97-98 (1995). *see also M & Assocs., Inc. v. City of Irondale*, 723 So.2d 592, 595 (Ala. 1998) and *see City of Winchester v. American Woodmark Corp.*, 252 Va. 98, 471 S.E.2d 495 (1996). And it is this clarification which renders questionable the majority's reliance upon earlier Supreme Court cases,[29] not to speak of cases from our

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[29] The majority relies upon our earlier reading of *Tyler Pipe*. Majority at 1019 (quoting *American Nat'l Can*, 114 Wash.2d at 248, 787 P.2d 545 (citing *Tyler Pipe*, 483 U.S. at 253, 107 S.Ct. 2810)). *American National Can*, in turn, did no analysis of the question of apportionment, but relied on citations to earlier cases. *American Nat'l Can*, 114 Wash.2d at 248, 787 P.2d 545 (citing *Department of Revenue v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 750, 98 S.Ct. 1388, 1399, 55 L.Ed.2d 682 (1978); *Standard Pressed Steel Co. v. Department of Revenue*, 419 U.S. 560, 564, 95 S.Ct. 706, 709, 42 L.Ed.2d 719 (1975); *Chicago Bridge & Iron Co. v. Department of Revenue*, 98 Wash.2d 814, 826-30, 659 P.2d 463 (1983)).

These cited cases, in turn, do not offer the support required. First and foremost, they predated the Supreme Court's recent clarification, in *Jefferson Lines*, on the distinction between sales

own court,[30] that dismissed apportionment challenges to Washington's B & O tax (Majority at 1019) by falsely analogizing nexus requirements to apportionment.[31]

The problem is Washington's current B & O tax scheme allows for double taxation by taxing manufacturing, extracting, or wholesaling activities within the state without apportioning, or limiting, the tax to that part of the receipts attributable to value produced in this state only. Credits provided by the 1987 amendments do not eliminate the apportionment problem because the tax still is based on value produced in other taxing jurisdictions. It therefore uniquely burdens interstate commerce.

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taxes and gross receipt taxes. *Standard Pressed Steel* is very limited. See *supra* n. 28. The holding in *Association of Wash. Stevedoring Cos.*, like that in *Standard Pressed Steel*, is predicated on the failure of the respondents to show how the lack of apportionment discriminated against interstate business. *Association of Wash. Stevedoring Cos.*, 435 U.S. at 750, 98 S.Ct. 1388. The Court in *Association of Wash. Stevedoring Cos.* also relied upon an analysis that likened the activity taxed to in-state sales. *Id.* Finally, *Chicago Bridge & Iron Co.* applied a sales analysis. 98 Wash.2d at 830, 659 P.2d 463.

30 *Tyler Pipe Indus., Inc. v. Department of Revenue*, 105 Wash.2d 318, 326, 715 P.2d 123 (1986), judgment vacated by 483 U.S. 232, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987); *National Can Corp. v. Department of Revenue*, 105 Wash.2d 327, 340-41, 732 P.2d 134 (1986) (*National Can I*), judgment vacated by *Tyler Pipe*, 483 U.S. 232, 107 S.Ct. 2810; *American Nat'l Can*, 114 Wash.2d at 243, 787 P.2d 545. These cases all predated *Jefferson Lines*. They also relied upon *Association of Wash. Stevedoring Cos.*, *Moorman Mfg.*, *Standard Pressed Steel*, and *Chicago Bridge & Iron Co.*, all cases which offer less than stellar support for the fair apportionment of Washington's B & O tax for reasons given *supra* at notes 28 and 29.

31 Our holding that the B & O tax was fairly apportioned in *National Can I* was based on our conclusion that this was a tax upon "the privilege of manufacturing or selling within the state" in the sense that minimal nexus requirements were satisfied. However, nexus does not satisfy a requirement for apportionment. *National Can I*, 105 Wash.2d at 341, 732 P.2d 134.

That an apportionment deficiency may not be corrected by allowing interstate businesses to credit similar taxes paid in other jurisdictions also seems quite apparent from the *Jefferson Lines* decision. The fair apportionment requirement implicates concerns of external consistency which look

> not to the logical consequences of cloning [the tax in other jurisdictions],[32] but to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State.

Jefferson Lines, 514 U.S. at 185, 115 S.Ct. 1331 (citations omitted). While a properly structured nondiscriminatory tax credit scheme might arguably satisfy concerns of internal consistency by diminishing, at least in theory, the prospect of double taxation, *Jefferson Lines* clarifies the external consistency requirement for gross receipt taxes can be satisfied only by proper apportionment, as was the rule in *Central Greyhound*, where the court held "taxation of an interstate bus line's gross receipts was constitutionally limited to that portion reflecting miles traveled within the taxing jurisdiction." *Jefferson*, 514 U.S. at 186, 115 S.Ct. 1331.

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32 Internal consistency exists when the imposition of an identical tax by every state in the Union would add no burden to interstate commerce that intrastate burden would not place interstate commerce at a disadvantage to intrastate commerce. *Jefferson Lines*, 514 U.S. at 185, 115 S.Ct. 1331. *See also American Trucking Ass'n v. Scheiner*, 483 U.S. 266, 284, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987) ("To pass the 'internal consistency' test, a state tax must be of a kind that, 'if applied by every jurisdiction, there would be no impermissible interference with free trade.'") (*quoting Armco Inc. v. Hardesty*, 467 U.S. 638, 644, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984)).

Moreover, as the Supreme court in *Tyler Pipe* specifically held:

> The facial unconstitutionality of Washington's gross receipts tax cannot be alleviated by examining the effect of legislation enacted by its sister States,

Tyler, 483 U.S. at 242, 107 S.Ct. 2810, as,

> "[T]he imunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment."

Tyler, 483 U.S. at 242 n. 11, 107 S.Ct. 2810 (quoting Armco, Inc., 467 U.S. at 645 n. 8, 104 S.Ct. 2620). But that is exactly the burden put on interstate commerce by this tax credit scheme which wholly depends for its utilization upon proof not only of quantification of the actual tax paid in other jurisdictions but proof of the technical subtleties of those divergent tax schemes as well.

VI. Conclusion

Thus, the majority pays lip service to the commerce clause but does little to protect the freedom of interstate commerce and nothing to protect interstate taxpayers from the avaricious appetite of state taxing authorities which, even to this day, extort payment of unconstitutional taxes while overtly denying taxpayers their statutory defense to payment, as well as their statutory right to refund. The majority's resolution does much for the coffers of this state but much to the constitutional rights of its citizens.

Until these priorities are reversed, I dissent.

MADSEN, J., concurs.

APPENDIX B

SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR THURSTON COUNTY

December 18, 1996

LETTER OPINION AND ORDER

Re: Chrsyler v. Revenue
Thurston County #94-2-02046-1

Grace v. Revenue
Thurston County #94-2-00079-6

Dear Counsel:

After reviewing your memoranda and reflecting on your oral argument presented Friday, November 15, 1996, including the additional submissions allowed subsequent to that argument, the court makes the following rulings:

Motions For Reconsideration

On April 15, 1996, the court issued a lengthy written opinion in this case. At that time the court denied the plaintiffs' request to enjoin the collection of the tax but in a declaratory ruling did grant them partial summary judgment applying the principles of *Tyler Pipe Industries, Inc. v. Washington*, 483 U.S. 232, 107 S. Ct. 2810, 97 L.Ed. 199 (1987) retroactively to all tax assessments still pending at the time of that United States Supreme

Court's ruling.[1] However, what saves the otherwise invalid tax, the court recognized, was the subsequent availability of a two-way credit pursuant to the principles of *American Nat'l Can v. Department of Revenue*, 114 Wn.2d 236, 787 P.2d 545 (1990) and RCW 82.04.440. At the same hearing, the court denied the state's cross-motion for dismissal advanced on a theory of issue preclusion. Beyond that, however, and in the event issue preclusion should fail, as it did, the state averred in their pleadings and later memoranda that *Tyler Pipe* should be applied only prospectively. Therefore, mirroring the court's above declaratory ruling on the constitutionality of the tax, the court *sua sponte* granted the state a partial summary judgment by ruling that the constitutionality of the tax is saved by the application of the two-way credit both retroactively and prospectively, as opposed to striking it down and granting full refunds. *Digital v. Dep't of Revenue*, 129 Wn.2d 177, 190 (1996).

The court's written memorandum opinion was reduced to judgment on June 28, 1996. If any ambiguity is generated by explanatory statements in the judgment signed by the court, a document which the parties ostensibly prepared to correctly reflect the court's written memorandum opinion, it should be resolved by reference to court's own memorandum opinion.

The plaintiffs and defendant now both move for reconsideration:

A. The plaintiffs ask for reconsideration on the basis that: (1) local businesses claimed credits valued up to one hundred times the value of credits claimed by out-

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[1] Subsequent to this court's ruling the supreme court handed down *Digital v. Dep't of Revenue*, 129 Wn.2d 177, 188, 205 (May 23, 1966) overruling *National Can II* and applying *Tyler Pipe* retroactively to all those cases pending at the time of its rule.

of-state businesses whose claims are also more difficult to calculate and that these factors either singularly or together show that the two-way credit is not meaningful relief against discrimination; and (2) there is credit only for out-of-state taxes that are similar to Washington's tax and no credit given for the tax schemes of other states which are dissimilar even though it might be possible to allocate some of that other state's tax to a manufacturing activity on some formulation other than what this state uses.

This court fully considered the rationale of *Fulton Corp. v. Faulkner*, —— U.S. ——, 116 S. Ct. 848 (1996), in the section of its memorandum opinion entitled *The Morass* pp. 33-38. Further, what *Oklahoma Tax Com'n v. Jefferson Lines, Inc.*, —— U.S. ——, 115 S. Ct. 1331, —— L.Ed.2d —— (1995) gives plaintiffs with its utterance that gross receipts taxes are merely a tax on income it takes away with its utterance that a particular apportionment formula need not be used. Their next argument that the credit is somehow inadequate or unavailable for consideration based on the distinction between pre-deprivation and post-deprivation proceedings is paralogistic in the context of this case. This is even further illustrated in their frustration of producing records from 1984 in 1996 which they urge as a further basis for relief. Finally, their argument as to honorable governments making "bait and switch" remedies with the benefit of hindsight was dealt with by the Washington Supreme Court in *American Can* pp. 250-253 and is not contrary to *Reich v. Collins*, 513 U.S., 130 L.Ed.2d 454, 115 S. Ct. 547 (1994). The fluctuating influence of the negative commerce clause creates an ebb and flow on what each sovereign state may circumscribe while it maintains its government through taxation. In such a dynamic context backward looking relief is reasonable

and only objectionable in the extreme. After all, as pointed out in *Welch v. Henry*, 305 U.S. 134, 146-148, 83 L.Ed. 87, 59 S. Ct. 121 (1938), taxation is neither a penalty, nor liability formed by contract, but a method of apportioning the cost of government among those who enjoy its benefits. Here the two-way credit retroactively applied clearly completes such a rational legislative purpose. *United States v. Carlton*, 512 U.S. ——, 129 L.Ed.2d 22, 28, 114 S. Ct. 2018 (1994).

B. The defendant asks for reconsideration arguing that since United States Supreme Court cases subsequent to *Tyler Pipe* and *American Can* have not undermined the holding in those cases that therefore one can not establish the presence of an intervening change of law as an obstacle to determining the case on the basis of issue preclusion. They are content to scold the court for not adopting their view and raise no new thing either in fact or law. Their argument was sufficiently addressed in the court's memorandum opinion in the section entitled *Issue Preclusion* pp. 28-33.

Insofar as "reconsideration" is concerned, the well known standard is seldom better stated then how it is found in *U.S. Dist. Crt., LCR 7(e)*:

> "(1) *Standards.* Motions for reconsideration are disfavored. The court will ordinarily deny such motions in the absence of a showing of manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence."

The above rule is not the grounds for the court's ruling but merely an accurate restatement of the substantive law in Washington. *Adams v. Western Host, Inc.*, 55 Wn. App. 601, 608, 779 P.2d 281 (1989).

Plaintiffs' and defendant's motions for reconsideration are denied.

Penalties.

The defendant requests penalties be added to the amount of tax found due under the court's ruling and that they be added to the judgment amount.

The state argues that on October 12, 1995, a letter was sent to the plaintiffs acknowledging the plaintiff's withdrawal of their administrative appeal and advising that their assessments were now final and subject to penalty if not paid in full prior to November 13, 1995. The state argues that when payment was not made by that date the penalties became mandatory and that they have no discretion not to impose them in the context of this case.

Grace filed their complaint seeking a pre-deprivation injunction on January 10, 1994, and Chrysler did the same on July 21, 1994. The taxpayers have operated with good faith in their reporting of tax liability and there is no evidence of an intent to evade tax. The gravamen of the taxpayer's suits is that the tax assessed is invalid and thus there is no tax properly due. Their complaints were not only not frivolous but both taxpayers partially prevailed on their prayer for relief from what they alleged was an unconstitutionally imposed tax. The department originally assessed the taxes at issue on Grace on November 1985 and December 1992, and on Chrysler February 25, 1994. Penalties were assessed against Grace in the 1985 assessment but apparently none in the 1992 assessment and none have ever been assessed against Chrysler. Although the lack of a penalty assessment is an additional reason to forego the imposition of penalties it is not the only basis.

RCW 82.32.050 instructs the department to assess any additional tax or penalty if what has been paid is less than that "properly due". Whether taxes are "properly due" must be answered by ascertaining the basis on which they are assessed. *Puget Sound P&L Co. v. State*, 70 Wn.2d 493, 496, 424 P.2d 634 (1967). Here the department assessed the taxes on a basis that *Tyler Pipe* should be given prospective application only. This court has ruled, and a plurality of *Digital Equipment* agrees, that *Tyler Pipe* must be applied both retroactively and prospectively in all those cases still pending at the time its ruling was handed down.

RCW 82.32.105 allows the department of revenue to waive or cancel penalties or interest where payment was not made on the due date through circumstances beyond the control of the taxpayer. The department has promulgated certain rules, principally WAC 458-20-228, that implement the statute.

Rather than strike down the tax in its entirety, as sought by the taxpayers, this court ruled that the two-way credit implemented through RCW 82.04.440 provided meaningful retroactive relief to the otherwise unconstitutional tax. This ruling clearly creates a circumstance beyond the control of the taxpayer. It is incongruous enough to prevail under their theory, correctly held, that the tax as imposed is unconstitutional and then be rewarded with a relief greatly diminished by a remedy applied retroactively. The relief is fair because it assigns to them payment of their share of taxes for government's benefits taking into account credits for like taxes paid in other jurisdictions. But to impose penalties on the amounts newly calculated to be due would be unjust. This result, even if it is now impossible to fully establish what credits might otherwise have applied so that the

assessment is diminished little or not at all, is a circumstance flowing from their partially, at least, successful suit and a circumstance beyond their control.

The Effect of Digital Equipment

Finally, as to the effect of *Digital Equipment Corp. v. Dept. of Revenue*, 129 Wn.2d 177, 916 P.2d 933 (1996), decided subsequent to this court's decision, it affirms this court's view that *Tyler Pipe* is required to be applied retroactively for all cases still pending at the time that decision was announced. On the other hand it does appear that the three opinions announced in *Digital* are mutually exclusive as to several rationales advanced in upholding the trial courts in that case. The state's argument that *Marks v. U.S.*, 430 U.S. 188, 193, 51 L.Ed.2d 260, 97 S. Ct. 990 (1977), would require this court to reverse its earlier decision does not survive the reasoning of *King v. Palmer*, 950 F.2d 771 (D.C. Cir. 1991) *cert.* denied 112 S. Ct. 3054).

The judgment should be amended to reflect the amount of tax due, the application of the credit in the case of Chrysler (Grace not being able to substantiate the credit's application to their specific situation) and interest as per the statute. No penalties are assessed as discussed above. Sincerely,

/s/ Richard D. Hicks
RICHARD D. HICKS
Superior Court Judge

RDH:tg

APPENDIX C

[Filed. Jun. 20, 1997]

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

No. 94-2-02046-1

CHRYSLER MOTORS CORPORATION,
Plaintiff,

v.

STATE OF WASHINGTON DEPARTMENT OF REVENUE,
Defendant.

ORDER DENYING MOTIONS FOR RECONSIDERATION AND FIXING AMOUNT OF FINAL JUDGMENT

Summary of Judgment

Pursuant to RCW 4.64.030, the following information should be entered in the Clerk's Execution Docket:

1.	Judgment Creditor:	State of Washington Department of Revenue
2.	Judgment Creditor's Attorney:	Donald F. Cofer, Assistant Attorney General
3.	Judgment Debtor:	Chrysler Motors Corporation
4.	Amount of [Principal]	$809,612.00
5.	Amount of Interest Owed to Date of Judgment:	$680,773.00

[Judgment Amount:	$1,490,456]
6. Total of Taxable Costs and Attorney Fees:	$125

ORDER

This matter came before the Court on the parties' cross-motions for reconsideration of the Final Judgment on Cross-Motions for Summary Judgment Granting the Motions in Part and Denying in Part entered June 28, 1996 (the "Final Judgment"), Plaintiff's motion opposing inclusion of Penalties in Final Judgment and the Court's request that the parties submit calculations regarding the amounts includable in the judgment. The Court has considered its Letter Opinion and Order dated December 18, 1996; the Final Judgment; the pleadings, papers and evidence recited therein; and the pleadings, papers and evidence filed or submitted in relation to the motions including the following:

1. Affidavit of John L. Lofredo together with exhibits, filed June 14, 1996;
2. Second Affidavit of Donald F. Cofer together with exhibits, filed June 26, 1996;
3. [Plaintiff's] Motion for Reconsideration of Judgment on Cross Motions for Summary Judgment, filed July 8, 1996;
4. Plaintiff's Memorandum in Support of Motion for Reconsideration, filed July 8, 1996;
5. Defendant's Motion for Reconsideration, filed July 8, 1996;
6. Second [sic] Affidavit fo Donald F. Cofer together with exhibits, filed July 8, 1996;

7. Third Affidavit of Donald F. Cofer together with exhibits, filed July 8, 1996;

8. Plaintiff's Opening Brief Opposing Inclusion of Penalties in Final Judgment, filed August 16, 1996;

9. Defendant's Memorandum in Response to Plaintiff's Motion to Preclude Penalties for Nonpayment of Tax, filed September 3, 1996;

10. Chrysler's Opposition to Defendant's Motion for Reconsideration, filed September 9, 1996;

11. Defendant's Memorandum in Response to Plaintiff's Motion for Reconsideration filed September 9, 1996;

12. Fourth Affidavit of Donald F. Cofer together with exhibit, filed September 9, 1996;

13. Plaintiff's Reply Brief Opposing Inclusion of Unassessed Penalties in Final Judgment, filed September 13, 1996;

14. Fifth Affidavit of Donald F. Cofer together with exhibits, filed November 14, 1996;

15. Plaintiff's Supplemental Brief Regarding the Impact, if any, of Digital Equipment, filed November 22, 1996; and

16. Defendant's Memorandum Regarding Effect of Digital Equipment Case on this Case, filed November 22, 1996.

The Court considered the Second [sic] and Third Affidavits of Donald F. Cofer together with exhibits, both filed July 8, 1996, as evidence solely for purpose of defendant's issue preclusion (collateral estoppel) defenses.

The Court did not consider these affidavits in its summary adjudication of the merits of plaintiff's claims.

Based on the arguments of counsel, the Final Judgment, the pleadings, papers and evidence presented; and this Court's Letter Opinion and Order dated December 18, 1996, the Court finds that plaintiff is entitled to a multiple activities tax credit ("MATC") in the amount of $125,929.00 for the period January 1, 1984 through June 30, 1988.

NOW, THEREFORE, based on the above findings, the Court hereby Orders that:

1. Defendant Department of Revenue's Motion for Reconsideration is denied.

2. Plaintiff Chrysler Motor Corporation's Motion for Reconsideration is denied.

3. Plaintiff Chrysler Motors Corporation's Motion Opposing Inclusion of Penalties in the Final Judgment is granted.

4. The amount of the judgment in favor of the Department of Revenue recited in paragraph 6 of the Final Judgment entered June 28, 1996 is hereby fixed in the amount of $935,612.00, less the MATC of $125,929.00, plus interest through June 20, 1997, in the amount of $680,773.00 for a total judgment in favor of the Department of Revenue of $1,490,456.00

Dated this 20th day of June, 1997.

/s/ R. D. Hicks
THE HONORABLE RICHARD D. HICKS

Presented by:

BOGLE & GATES, P.L.L.C.

/s/ Scott M. Edwards
John T. Piper, WSBA # 2910
D. Michael Young, WSBA # 6391
Scott M. Edawrds, WSBA # 26455
Attorneys for Plaintiff
Chrysler Motors Corporation

Notice of presentation waived:

CHRISTINE O. GREGOIRE
Attorney General

/s/ Donald F. Cofer
Donald F. Cofer, WSBA # 10896
Asistant Attorney General
Attorneys for Defendant
Washington State Department of Revenue

APPENDIX D

[Filed Jun. 20, 1996]

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY

No. 94-2-02046-1

CHRYSLER MOTORS CORPORATION,
Plaintiff,

v.

STATE OF WASHINGTON DEPARTMENT OF REVENUE,
Defendant.

FINAL JUDGMENT ON CROSS MOTIONS FOR SUMMARY JUDGMENT GRANTING THE MOTIONS IN PART AND DENYING IN PART

This matter came before the Court on the parties' presentation of alternative forms of judgment or order implementing the Court's Memorandum Opinion of April 15, 1996. The Court has considered its Memorandum Opinion of April 15, 1996, the pleadings filed in this action, the written and oral motions of the parties, the issues, arguments, and authorities presented by the parties in oral argument before the Court and in the papers filed in this action, and the evidence in the record, consisting of the following pleadings, paper, and evidence:

1. Amended Complaint for Declaratory Judgment and Injunctive Relief, filed November 28, 1995;

2. Plaintiff's Motion for Partial Summary Judgment, filed November 28, 1995;
3. Plaintiff's Memorandum of Points and Authorities in Support of Plaintiff's Motion for Partial Summary Judgment, filed November 28, 1995;
4. Affidavit of John T. Piper in Support of Plaintiff's Motion for Partial Summary Judgment together with exhibits and other attachments, filed November 28, 1995;
5. Defendant's Consent to Amendment of Plaintiff's Complaint, filed January 10, 1996;
6. Answer to First Amended Complaint, filed January 10, 1996;
7. Defendant's Motion for Partial Summary Judgment—Issue Preclusion, filed January 10, 1996;
8. Defendant's Memorandum in Support of Partial Summary Judgment, filed January 10, 1996;
9. Affidavit of Donald F. Cofer together with exhibits and other attachments, filed January 10, 1996;
10. Defendant's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, filed February 2, 1996;
11. Motion to Strike Affidavit of John T. Piper Filed in Support of Plaintiff's Motion for Partial Summary Judgment, filed February 2, 1996;
12. Plaintiff's Answer to Defendant's Counterclaim, filed February 2, 1996;
13. Chrysler's Opposition to Department's Motion for Partial Summary Judgment, filed February 5, 1996;
14. Plaintiff's Response to Defendant's Motion to Strike Piper Affidavit, filed March 27, 1996;

15. Motions for Order that Matters Are Admitted on Grounds of Insufficiency of Objections and Answers, filed April 2, 1996;

16. Plaintiff's Reply Brief in Support of its Motion for Partial Summary Judgment, filed April 3, 1996;

17. Defendant's Reply Memorandum in Support of Defendant's Motion for Partial Summary Judgment, filed April 5, 1996;

18. Plaintiff's Opposition to Defendant's Motion for Order that Matters Are Admitted, filed April 8, 1996;

19. Plaintiff's Motion to Strike Defendant's Motion for Order that Matters Are Admitted, filed April 8, 1996; and

* * * *

In addition to the above pleadings and papers filed in this action, the Court also took judicial notice of and considered as evidence solely for purposes of Defendant's issue preclusion (collateral estoppel) defenses, as requested by Defendant at oral argument and without objection from Plaintiff, the following briefs filed in *National Can Corporation, et al. v. State of Washington Department of Revenue, et al.*, Washington Supreme Court No. 56348-9; and *American National Can Corporation, et al. v. State of Washington Department of Revenue, et al.*, United States Supreme Court No. 89-1854:

1. Brief for Appellants, *National Can Corporation, et al. v. State of Washington Department of Revenue*, United States Supreme Court No. 85-2006, filed November 19, 1986;

2. Brief of Appellants, *American National Can Corporation, et al. v. State of Washington Depart-*

ment of Revenue, et al., Washington Supreme Court No. 56348-9, filed August 9, 1989;

3. Appellant's Reply Brief and Answer to Cross-Appeal, *American National Can Corporation, et al. v. State of Washington, Department of Revenue, et al.*, Washington Supreme Court No. 56348-9, filed October 16, 1989; and

4. Petition to United States Supreme Court for Writ of Certiorari to the Washington Supreme Court, *American National Can Corporation, et al. v. State of Washington Department of Revenue, et al.*, United States Supreme Court No. 89-1854, filed May 29, 1990.

The Court considered this evidence solely for the purpose of determining whether any genuine issue of material fact exists in regard to the elements (i.e., identity of parties, identity of issues, final judgment on the merits, etc.) of issue preclusion (collateral estoppel). The Court did not consider this evidence in its summary adjudication of the merits.

Based on the arguments of counsel, the Memorandum Opinion of April 15, 1996, and the pleadings, papers, and evidence presented, the Court finds:

1. No genuine issue of material fact exists concerning any of the legal issues presented to the Court.

2. Each of the respective parties is entitled, as a matter of law, to partial judgment, thereby resolving all the parties' claims in this action.

NOW, THEREFORE, based on the above findings, the Court enters judgment as follows:

1. Defendant Department of Revenue's Motion to Strike Affidavit of John T. Piper in Support of Plaintiff's

Motion for Partial Summary Judgment and Attachments Thereto is denied;

2. Defendant Washington State Department of Revenue's Motion for Order that Matters Are Admitted on Grounds of Insufficiency of Objections and Answers is denied.

3. Defendant Washington State Department of Revenue's Motion for Partial Summary Judgment, claiming issue preclusion (collateral estoppel) based on *National Can Corp. v. Department of Rev.*, 109 Wn.2d 878, 749 P.2d 1286, appeal dismissed, *cert. denied*, 486 U.S. 1040 (1988) (on the issue of whether the United States Supreme Court's discrimination ruling in *Tyler Pipe Industries* applies retroactively), based on *American Nat'l Can Corp. v. Department of Revenue*, 114 Wn.2d 236, 787 P.2d 545, *cert. denied*, 498 U.S. 880 (1990) (on the issues of whether the two-way credit discriminates against interstate commerce and whether the two-way credit applies retroactively as a matter of state law), and based on *Tyler Pipe Industries, Inc. v. Washington State Dep't of Rev.* and *National Can Corp. v. Washington State Dep't of Rev.*, 483 U.S. 232, 107 S. Ct. 2816, 97 L. Ed. 2d 199 (1987) (on the issue of whether Washington's wholesaling and retailing B & O taxes are fairly apportioned), is denied. Although Chrysler was a litigant in those cases and the issues involved in them were resolved against Chrysler in the final judgments on the merits, the other requirements for collateral estoppel are not present; there being a legitimate question whether the issues are identical (as opposed to substantially similar) and to resolve the case by dismissal for collateral estoppel would work a substantial injustice.

4. Judgment is entered on Plaintiff Chrysler's complaint seeking declaratory judgment and injunction as

follows: Plaintiff Chrysler's Motion for Partial Summary Judgment, requesting an injunction against the collection of the taxes at issue, is granted in part and denied in part. Chrysler is granted partial summary judgment that the discrimination ruling in *Tyler Pipe Industries, Inc. v. Washington State Dep't of Rev.* and *National Can Corp. v. Washington State Dep't of Rev.*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987), is to be applied retroactively to January 1, 1984. However, the sole relief to which Chrysler is entitled for the assessments at issue for the periods January 1, 1984 through June 30, 1988, is to claim Multiple Activities Tax Credits ("credits" or "MATC") for gross receipts taxes paid to other jurisdictions as authorized by RCW 82.04.440 (as amended August 12, 1987), in accord with *American Nat'l Can Corp. v. Department of Revenue*, 114 Wn.2d 236, 787 P.2d 545, *cert. denied*, 498 U.S. 880 (1990), which applied the two-way credit of RCW 82.04.440 retroactively as an exclusive remedy.

5. On Defendant Department of Revenue's counterclaim, the Court *sua sponte* grants Defendant, as the nonmoving party, partial summary judgment on the merits:

(a) That B & O taxes assessed againt Chrysler and the two-way credit of RCW 82.04.440, when applied to periods on or after August 12, 1987, do not violate the Commerce Clause. In reaching this conclusion, the Court considered the arguments raised by Chrysler concerning facial discrimination, compensatory taxes, and lack of fair apportionment, and recent decisions in *Fulton Corporation v. Faulkner*, 516 U.S. ——, 115 S. Ct. 848, 133 L. Ed. 2d 796 (1996), *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. ——, 115 S. Ct. 1331, 131 L. Ed. 2d 261 (1995), *West Lynn Creamery, Inc. v. Healy*, 512 U.S. ——, 114 S. Ct. 2205, 129 L. Ed. 2d 157 (1994), and *Oregon Waste Systems, Inc. v. De-*

partment of Envl. Quality, 511 U.S. ——, 114 S. Ct. 1345, 128 L. Ed. 2d 13 (1994);

(b) That the two-way credit enacted in 1987 applied retroactively to all tax periods at issue in this case, i.e., to the assessments for the tax periods January 1, 1984 through June 30, 1988;

(c) That applying the 1987 credit statute retroactively to all the tax periods at issue in this cases does not violate the Commerce Clause. In reaching this conclusion, the Court considered: the arguments raised by Chrysler concerning facial discrimination, compensatory taxes, and lack of fair apportionment, and recent decisions in *Fulton Corporation v. Faulkner,* 516 U.S. ——, 116 S. Ct. 848, 133 L. Ed. 2d 796 (1996), *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.,* 514 U.S. ——, 115, S. Ct. 1331, 131 L. Ed. 2d 261 (1995), *West Lynn Creamery, Inc. v. Healy,* 512 U.S. ——, 114 S. Ct. 2205, 129 L. Ed. 2d 157 (1994), and *Oregon Waste Systems, Inc. v. Department of Envtl. Quality,* 511 U.S. ——, 114 S. Ct. 1345, 129 L. Ed. 2d 13 (1994);

(d) In applying the 1987 credit statute retroactively to the tax periods at issue in this case, the Court considered the argument raised by Chrysler in reliance on the recent decision in *In re Shepard,* 127 Wn.2d 185, 193, 898 P.2d 828 (1995) including a separation of powers contention; and

(e) That applying the 1987 credit statute retroactively as the sole remedy for a tax assessment under the statutory scheme declared unconstitutionally discriminatory in *Tyler Pipe Industries, Inc. v. Washington State Dep't of Rev.* and *National Can Corp. v. Washington State Dep't of Rev.,* 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987), does not violate federal due process requirements addressed in *McKesson Corp. v. Division of Alco-*

holic Beverages & Tobacco, 496 U.S. 18, 110 S. Ct. 2238 (1990). * * *

6. Therefore, the Court *sua sponte* grants Defendant Washington State Department of Revenue a summary judgment, and hereby directs that judgment be entered in favor of the Department of Revenue [in an amount to be calculated;] minus the amount of MATC, if any, to which the Department may in its discretion, determine that Plaintiff Chrysler is entitled; plus interest pursuant to [Chapter] RCW 82.32. * * * Interest on this judgment shall accrue from the date of its entry as provided in RCW 4.56.110. In its discretion, the Defendant Department of Revenue may reduce the amount of its judgment to the extent that it determines that Plaintiff Chrysler is entitled to any MATC pursuant to RCW 82.04.440 and WAC 458-20-19301. * * * * For that purpose, Defendant has requested and is hereby granted the opportunity to conduct discovery concerning Chrysler's possible entitlement to MATC as follows:

a. The Department may take the deposition of John L. Loffredo in the Seattle offices of Bogle & Gates at a mutually agreeable time and date not later than August 30, 1996.

b. Plaintiff Chrysler shall, no later than August 7, 1996, supplement its responses to Defendant's prior interrogatories and requests for production to reflect additional facts and documents learned or discovered since the time of Chrysler's original discovery responses.

c. By September 30, 1996, the Department shall serve and file with the Court the amount of MATC if any, to which it has determined Chrysler is entitled[, or report to, and seek assistance from, the Court in making that determination.]

7. This is a final judgment as to all claims [covered by the Court's memorandum opinion].

8. Alternatively, should the procedure ordered above (allowing the Defendant Department of Revenue to determine whether and to what extent its judgment on its counterclaim will be reduced by any Multiple Activities Tax Credit) cause this judgment to be considered anything other than a final judgment, the Court finds as follows:

> a. The constitutional issues decided by this judgment are of great significance both to the parties to this action and to other taxpayers. Scores of other taxpayers have most of these same issues pending in tax refund actions that are also before this court for decision. A delay in the resolution on appeal of the issues in this case—and the resulting perpetuation of uncertainties in important tax laws, tax liabilities, and tax revenues—would work a hardship on Plaintiff Chrysler, on the scores of other taxpayers whose cases are pending, and on this Court, which has an obligation to decide long-pending cases without undue delay.
>
> b. The amount of the judgment for the Defendant Department of Revenue has been determined subject only to possible adjustment by the Department [or the Court] for the MATC.
>
> * * * *
>
> [c.] The determination of the amount of any MATC is [determinable by the Department, by stipulation, or by the Court.]

Based on the specific findings set forth above, the Court determines that there is no just cause for delay in the entry of final judgment on Plaintiff's claims for declaratory judgment and injunction. The Court therefore directs

the entry of final judgment on those claims in accordance with paragraph 4 above. The Court thus certifies that this is a final, appealable judgment pursuant to CR 54(b).

DATED this 28th day of June, 1996.

/s/ R. D. Hicks
RICHARD D. HICKS
Judge

APPENDIX E

[Filed Jun. 28, 1996]

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY

No. 94-2-00079-6

W.R. GRACE & CO.—CONN.,
Plaintiff,
v.
STATE OF WASHINGTON DEPARTMENT OF REVENUE,
Defendant.

FINAL JUDGMENT ON CROSS MOTIONS FOR SUMMARY JUDGMENT GRANTING THE MOTIONS IN PART AND DENYING IN PART

This matter came before the Court on the parties' presentation of alternative forms of judgment or order implementing the Court's Memorandum Opinion of April 15, 1996. The Court has considered its Memorandum Opinion of April 15, 1996, the pleadings filed in this action, the written and oral motions of the parties, the issues, arguments, and authorities presented by the parties in oral argument before the Court and in the papers filed in this action, and the evidence in the record, consisting of the following pleadings, papers, and evidence:

1. Complaint for Declaratory Judgment, Injunctive Relief, and Recovery of Damages, filed January 10, 1994;
2. Amended Answer of Defendant State of Washington Department of Revenue, filed August 22, 1994;

3. Plaintiff's Answer to the Counterclaim Brought by Revenue, filed September 14, 1994;

4. Order of Partial Dismissal, Dismissing Plaintiff's Action as to Defendants Mike Lowry, Christine O. Gregoire and Len McComb, entered March 13, 1995;

5. Plaintiff's Motion for Partial Summary Judgment, filed October 31, 1995;

6. Plaintiff's Memorandum of Points and Authorities in Support of Plaintiff's Motion for Partial Summary Judgment, filed October 31, 1995;

7. Affidavit of John T. Piper in Support of Plaintiff's Motion for Partial Summary Judgment together with exhibits and other attachments, filed October 31, 1995;

8. Defendant's Motion for Partial Summary Judgment—Issue Preclusion, filed October 31, 1995;

9. Defendant's Memorandum in Support of Partial Summary Judgment, filed October 31, 1995;

10. Affidavit of Donald F. Cofer together with exhibits, filed October 31, 1995;

11. Defendant's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment, filed November 21, 1995;

12. Motion to Strike Affidavit of John T. Piper in Support of Plaintiff's Motion for Partial Summary Judgment and Attachments Thereto, filed November 21, 1995;

13. W.R. Grace's Response to Defendant's Motion for Partial Summary Judgment, filed November 21, 1995;

14. Defendant's Reply Memorandum in Support of Defendant's Motion for Partial Summary Judgment, filed December 31, 1995;
15. Affidavit of John M. Jones together with exhibit, filed December 21, 1995;
16. Affidavit of Joan M. Marchioro together with exhibit, filed December 21, 1995;
17. Plaintiff's Reply Brief in Support of its Motion for Partial Summary Judgment, filed December 21, 1995;
18. W.R. Grace's Response to Defendant's Motion to Strike Piper Affidavit, filed December 21, 1995;
19. Affidavit of G. Kim Risenmay, filed April 8, 1996;
20. Notice of Additional Legal Authorities, filed April 8, 1996; and

* * * *

In addition to the above pleadings and papers filed in this action, the Court also took judicial notice of and considered as evidence solely for purposes of Defendant's issue preclusion (collateral estoppel) defenses, as requested by Defendant at oral argument and without objection from Plaintiff, the following briefs filed in *National Can Corporation, et al. v. State of Washington Department of Revenue,* United States Supreme Court No. 85-2006; *American National Can Corporation, et al. v. State of Washington Department of Revenue, et al.,* Washington Supreme Court No. 56348-9; and *American National Can Corporation, et al. v. State of Washington Department of Revenue, et al.,* United States Supreme Court No. 89-1854;

1. Brief for Appellants, *National Can Corporation, et al. v. State of Washington Department of Revenue,* United States Supreme Court No. 85-2006, filed November 19, 1986;

2. Brief of Appellants, *American National Can Corporation, et al. v. State of Washington Department of Revenue, et al.*, Washington Supreme Court No. 56348-9, filed August 9, 1989;

3. Appellant's Reply Brief and Answer to Cross-Appeal, *American National Can Corporation, et al. v. State of Washington Department of Revenue , et al.*, United States Supreme Court No. 56348-9, filed October 16, 1989; and

4. Petition to United States Supreme Court for Writ of Certiorari to the Washington Supreme Court, *American National Can Corporation, et al. v. State of Washington Department of Revenue, et al.*, United States Supreme Court No. 89-1854, filed May 29, 1990.

The Court considered this evidence solely for the purpose of determining whether any genuine issue of material fact exists in regard to the elements (i.e., identity of parties, identity of issues, final judgment on the merits, etc.) of issue preclusion (collateral estoppel). The Court did not consider this evidence in its summary adjudication of the merits.

Based on the arguments of counsel, the Memorandum Opinion of April 15, 1996, and the pleading, papers, and evidence presented, the Court finds:

1. No genuine issue of material fact exists concerning any of the legal issues presented to the Court.

2. Each of the respective parties is entitled, as a matter of law, to partial judgment, thereby resolving all the parties' claims in this action.

NOW, THEREFORE, based on the above findings, the Court directs that judgment be entered as follows:

1. Defendant Department of Revenue's Motion to Strike Affidavit of John T. Piper in Support of Plaintiff's Motion for Partial Summary Judgment and Attachments Thereto is denied.

2. Defendant Washington State Department of Revenue's Motion for Order that Matters Are Admitted on Grounds of Insufficiency of Objections and Answers is denied.

3. Defendant Washington State Department of Revenue's Motion for Partial Summary Judgment, claiming issue preclusion (collateral estoppel) based on *National Can Corp. v. Department of Rev.*, 109 Wa.2d 878, 749 P.2d 1286, appeal dismissed, *cert. denied*, 486 U.S. 1040 (1988) (on the issue of whether the United States Supreme Court's discrimination ruling in *Tyler Pipe Industries* applies retroactively), based on *American Nat'l Can Corp. v. Department of Revenue*, 114 Wn.2d 236, 787 P.2d 545, *cert. denied*, 498 U.S. 880 (1990) (on the issues of whether the two-way credit discriminates against interstate commerce and whether the two-way credit applies retroactively as a matter of state law), and based on *Tyler Pipe Industries, Inc. v. Washington State Dep't of Rev.* and *National Can Corp. v. Washington State Dep't of Rev.*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987) (on the issue of whether Washington's wholesaling and retailing B & O taxes are fairly apportioned), is denied. Although Grace was a litigant in those cases and the issues involved in them were resolved against Grace in the final judgments on the merits, the other requirements for collateral estoppel are not present; there being a legitimate question whether the issues are identical (as opposed to substantially similar) and to resolve the case by dismissal for collateral estoppel would work a substantial injustice.

4. Judgment is entered on Plaintiff Grace's complaint seeking a declaratory judgment and injunction as follows:

Plaintiff Grace's Motion for Partial Summary Judgment, requesting an injunction against the collection of the taxes at issue, is granted in part and denied in part. Grace is granted partial summary judgment that the discrimination ruling in *Tyler Pipe Industries, Inc. v. Washington State Dep't of Rev.* and *National Can Corp. v. Washington State Dep't of Rev.*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987), is to be applied retroactively to January 1, 1980. However, the sole relief to which Grace is entitled, for the assessments at issue for the periods January 1, 1980 through December 31, 1990, is to claim Multiple Activities Tax Credits ("credits" or "MATC") for gross receipts taxes paid to other jurisdictions as authorized by RCW 82.04.440 (as amended August 12, 1987), in accord with *American Nat'l Can Corp. v. Department of Revenue*, 114 Wn.2d 236, 787 P.2d 545, *cert. denied*, 498 U.S. 880 (1990) which applied the two-way credit of RCW 82.04.440 retroactively as an exclusive remedy.

5. On Defendant Department of Revenue's counterclaim, the Court *sua sponte* grants Defendant, as the nonmoving party, partial summary judgment on the merits:

(a) That B & O taxes assessed against Grace and the two-way credit of RCW 82.04.440, when applied to periods on or after August 12, 1987, do not violate the Commerce Clause. In reaching this conclusion, the Court considered the arguments raised by Grace concerning facial discrimination, compensatory taxes, and lack of fair apportionment, and recent decisions in *Fulton Corporation v. Faulkner*, 516 U.S. ——, 116 S. Ct. 848, 133 L. Ed. 2d 796 (1996), *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. ——, 115 S. Ct. 1331, 131 L. Ed. 2d 261 (1995), *West Lynn Creamery, Inc. v. Healy*, 512 U.S. ——, 114 S. Ct. 2205, 129 L. Ed. 2d 157

(1994), and *Oregon Waste Systems, Inc. v. Department of Envtl. Quality*, 511 U.S. ——, 114 S. Ct. 1345, 128 L. Ed. 2d 13 (1994);

(b) That the two-way credit enacted in 1987 applied retroactively to all tax periods at issue in this case, i.e., to the assessments for tax periods January 1, 1980 through December 31, 1990;

(c) That applying the 1987 credit statute retroactively to all the tax periods at issue in this case does not violate the Commerce Clause. In reaching this conclusion, the Court considered: the arguments raised by Grace concerning facial discrimination, compensatory taxes, and lack of fair apportionment, and recent decisions in *Fulton Corporation v. Faulkner*, 516 U.S. ——, 116 S. Ct. 848, 133 L. Ed. 2d 796 (1996), *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. ——, 115 S. Ct. 1331, 131 L. Ed. 2d 261 (1995), *West Lynn Creamery, Inc. v. Healy*, 512 U.S. ——, 114 S. Ct. 2205, 129 L. Ed. 2d 157 (1994), and *Oregon Waste Systems, Inc. v. Department of Envtl. Quality*, 511 U.S. ——, 114 S. Ct. 1345, 129, L .Ed. 2d 13 (1994);

(d) In applying the 1987 credit statute retroactively to the tax periods at issue in this case, the Court considered the argument raised by Grace in reliance on the recent decision in *In re Shepard*, 127 Wn.2d 185, 193, 898 P.2d 828 (1995) including a separation of powers contention; and

(e) That applying the 1987 credit statute retroactively as the sole remedy for a tax assessment under the statutory scheme declared unconstitutionally discriminatory in *Tyler Pipe Industries, Inc. v. Washington State Dep't of Rev.* and *National Can Corp. v. Washington State Dep't of Rev.*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987), does not violate federal due process require-

ments addressed in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 110 S. Ct. 2238 (1990). * * *

6. Therefore, the Court *sua sponte* grants Defendant Washington State Department of Revenue a summary judgment, and hereby directs that judgment be entered in favor of the Department of Revenue [in an amount to be calculated]; minus the amount of MATC, if any, to which the Department may, in its discretion, determine that Plaintiff Grace is entitled; and minus an agreed adjustment by the Department to correct a matter not at issue in this action; plus interest pursuant to [Chapter] RCW 82.32. * * * Interest on this judgment shall accrue from the date of its entry as provided in RCW 4.56.110. In its discretion, the Defendant Department of Revenue may reduce the amount of its judgment to the extent that it determines that Plaintiff Grace is entitled to any MATC pursuant to RCW 82.04.440 and WAC 458-20-19301. * * * * For that purpose, Defendant has requested and is hereby granted the opportunity to conduct discovery concerning Grace's possible entitlement to MATC as follows:

a. The Department may take the deposition of Timothy Cremin in the Seattle offices of Bogle & Gates at a mutually agreeable time and date not later than August 30, 1996.

b. Plaintiff Grace shall, no later than August 7, 1996, supplement its responses to Defendant's prior interrogatories and requests for production to reflect additional facts and documents learned or discovered since the time of Grace's original discovery responses.

c. By September 30, 1996, the Department shall serve and file with the Court the amount of MATC, if any, to which it has determined Grace is entitled

[or report to, and seek assistance from, the Court in making that determination].

7. * * * This is a final judgment as to all claims [covered by the Court's Memorandum Opinion].

8. Alternatively, should the procedure ordered above (allowing the Defendant Department of Revenue to determine whether and to what extent its judgment on its counterclaim will be reduced by any Multiple Activities Tax Credit) cause this judgment to be considered anything other than a final judgment, the Court finds as follows:

a. The constitutional issues decided by this judgment are of great significance both to the parties to this action and to other taxpayers. Scores of other taxpayers have most of these same issues pending in tax refund actions that are also before this court for decision. A delay in the resolution on appeal of the issues in this case—and the resulting perpetuation of uncertainties in important tax laws, tax liabilities and tax revenues—would work a hardship on Plaintiff Grace, on the scores of other taxpayers whose cases are pending, and on this Court, which has an obligation to decide long-pending cases without undue delay.

b. The amount of the judgment for the Defendant Department of Revenue has been determined subject only to possible adjustment by the Department [or the Court] for the MATC.

* * * *

d. The determination of the amount of any MATC is [determined by the Dept, by stipulation, or by the Court].

Based on the specific findings set forth above, the Court determines that there is no just cause for delay in the entry of final judgment on Plaintiff's claims for declaratory judgment and injunction. The Court therefore directs the entry of final judgment on those claims in accordance with paragraph 4 above. The Court thus certifies that this is a final, appealable judgment pursuant to CR 54(b).

DATED this 28th day of June, 1996.

/s/ Richard D. Hicks
RICHARD D. HICKS
Judge